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NOTE

DISCOUNTED MINI-TENDER OFFERS: A FRAUDULENT BUSINESS SCHEME

I. INTRODUCTION

Remarkably, thousands of investors are selling their stock in companies for less than they could sell them on the open market. Why would anyone make such a radical decision? These decisions are not being made by foolish investors; rather, they are the result of fraudulent and deceptive practices by manipulative "businesspersons" who are employing a relatively new investment tool known as mini-tender offers.

Mini-tender offers are a variation of the popular investment tool known as a tender offer. In the sense that investors recognize tender offers as takeover methods, the term mini-tender offer is actually a misnomer because it does not effectuate the complete takeover of a company. Simply stated, a mini-tender offer consists of an acquiror who seeks to buy up to 5% (usually far less than what is required to take over a company) of a target company’s shares at a price less than what the

1. Because they are a relatively new phenomena, a standard spelling does not exist for "mini-tender offers." Other spellings, all of which encompass the subject of this Note, include "minitender offers" and "mini tender offers." This Note uses the most often cited spelling, "mini-tender offers."

2. A tender offer occurs when an individual or group offers to buy shares of a publicly held company, usually at a price above the current market value and usually to acquire control of the corporation. See H.R. REP. No. 90-1711, at 2 (1968); see also infra Part IIA (discussing tests used to determine when a tender offer exists). Tender offers, as we know them today, originated in Great Britain where they were known as takeover bids. See 5 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 2128-29 (3d ed. 1990). As investors adopted this type of takeover method in the United States, they became known as tender offers. See id. For the purposes of this Note, this takeover method will be referred to as a tender offer.

3. Five percent is the threshold level to trigger disclosure requirements under the Williams Act. See infra Part IIB.2.

4. A target company is a company that is being sought after through a proxy contest or a tender offer. See KENNETH W. CLARKSON ET AL., WEST’S BUSINESS LAW: TEXT: CASES: LEGAL, ETHICAL, REGULATORY, AND INTERNATIONAL ENVIRONMENT 853 (6th ed. 1995); WILLIAM A. KLEIN & J. MARK RAMSEYER, BUSINESS ASSOCIATIONS: AGENCY, PARTNERSHIPS, AND
security trades for on the open market. This can be accomplished by one of two methods. In one instance, the bidder may offer to buy shares at less than the market price, and, once the shareholder tenders, the bidder will flip the shares at the current market price. Alternatively, the bidder may buy the shares at the market price, but will not consummate the offer unless the market price increases between the time the shareholder tenders and the buy date. It is significant to acknowledge at the outset that a shareholder who tenders his or her shares in a mini-tender offer retains no withdrawal rights as he or she would in a tender offer. The practical effect of this deceptive practice is that the average shareholder has his or her investment “stolen” right from under him or her and the mini-tender offeror profits hundreds of thousands of dollars in a matter of days, possibly even hours.

A fundamental understanding of tender offers is crucial to analyze the implications of mini-tender offers, empathize with the exploited shareholders, and understand the proposed solutions. A tender offer, as it is commonly known, is a transaction that consists of a company that wishes to acquire a target company, and does so by soliciting the target company’s shareholders to tender their shares in exchange for some consideration, usually stock in the acquiring company or cash. Perhaps because of their instant popularity, proper regulatory schemes for tender offers have been a subject of great dispute since their inception.

When Congress ratified the Williams Act in 1968, its primary objective was to “close a significant gap in investor protection” left open by the existing federal securities laws concerning tender offers. The “gap” referred to by Senator Williams illustrates that previous federal securities laws regulated many of the most common takeover methods...
except cash tender offers. As Congress became aware of the deceptive practices being implemented in cash tender offer transactions, it designed the Williams Act to regulate takeover methods evenhandedly. Notwithstanding the enforcement of the Williams Act and the regulation of cash tender offers, fraudulent mini-tender offers are currently being employed throughout the securities industry.

One of the primary goals of the federal securities laws is to end current, and prevent future, fraudulent activities in the marketplace. But what is the threshold level that the fraudulent activities must reach before Congress, or the agency empowered by it, in this case the Securities Exchange Commission ("SEC"), will act to prevent and end such practices? History has illustrated that it sometimes takes exorbitant losses before Congress examines a particular situation and decides whether federal regulation is the best solution. One of the most notable examples illustrating Congress' failure to act proactively is the Great Depression and the subsequent enactment of the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"). Investors had lost billions of dollars before Congress decided federal intervention was necessary to prevent people from being further defrauded and exploited.

Tender offers quickly became the most popular and cost effective method for taking over companies. However, along with their popularity came executives who took advantage of the opportunity to make millions of dollars on this unregulated device, while defrauding investors. Although the Williams Act put a halt to many of these deceptive practices, spurious "businesspersons" have recently learned how to exploit a loophole in the Williams Act. This loophole exists in § 14(d) of the Exchange Act where the law specifically fails to require a tender offeror to file a tender offer statement for any tender offer.

12. See S. REP. NO. 90-550, at 4 (1967). Common takeover methods that were regulated by federal securities laws prior to the Williams Act included stock for stock exchanges, proxy contests, and stock tender offers. See id. at 2-3.
14. See Martinez, supra note 5.
15. See discussion infra Part II.B.
20. See id.
acquiring less than 5% of the target company's securities. This Note does not suggest that all tender offers, regardless of size, should be required to file a tender offer statement; rather, as set forth in Part V, other solutions are much more viable.

During the writing of this Note, the SEC issued an interpretive release concerning mini-tender offers, however, this interpretive release does not provide adequate measures to stop the fraudulent practices associated with mini-tender offers. The time is ripe for the SEC to issue new regulations and put a stop to fraudulent mini-tender offers. Fraudulent “businesspersons” have already cheated hundreds of companies and several thousand investors through the use of misleading mini-tender offers. It is time that the SEC ends these practices before corporate America is further exploited.

Part II of this Note examines the development of tender offers and reviews relevant sections of the Securities Act, the Exchange Act, and the Williams Act. Part III discusses the development, process, and significance of mini-tender offers. Part IV examines the SEC’s reaction to mini-tender offers and its lack of efficacy. In conclusion, Part V proposes two solutions to the problems associated with mini-tender offers: (1) that the SEC pass a regulation that illustrates violations of § 14(e) of the Exchange Act, and (2) that the SEC pass a regulation requiring brokerage firms to scrutinize mini-tender offers for reasonably suspect information vis-à-vis § 14(e) of the Exchange Act. As discussed in further detail below, these remedies would likely work best if used in conjunction with one another rather than independently.

II. THE DEVELOPMENT OF TENDER OFFERS

How can a shareholder have an impact on a corporation’s policy if he or she is unhappy with the current management? Does a shareholder truly have the ability to replace management? Truth be told, the vast majority of shareholders do not own enough shares of a corporation to make even the slightest difference in the outcome of shareholder votes, much less be in a position to replace management. Thus, how is the shareholder supposed to impact a corporation’s policy or replace management?

23. See Interpretive Release, supra note 7, at 2245.
24. See discussion infra Part III.C.
25. See KLEIN & RAMSEYER, supra note 4, at 484.
One who wishes to overthrow the management of a corporation generally has two options available: a proxy contest or a tender offer. Proxy contests are fights to obtain control of shareholder votes. Although they were relatively common in the 1950s, they soon gave way to the more efficient method of tender offers. Purposefully, a concrete definition of a tender offer does not exist, but it generally "consists of a bid by an individual or group to buy shares of a company—usually at a price above the current market price."

Investors quickly adopted the tender offer as the preferred takeover method because of the many advantages it has over the traditional proxy contest. Among the numerous, there are two principal advantages. First, and perhaps the predominant reason why tender offers became so popular, is that cash tender offers were not regulated in any manner comparable to the proxy contest prior to the Williams Act. Second, acquiring shares through a tender offer is generally much faster than through a proxy contest. In a tender offer, the offeror has considerable flexibility in deciding how long, or short, to keep the tender offer open. This affords the target company less time to prepare a defense. In other words, because the tender offeror does not need to acquire proxies from the shareholders of the target company, the offeror can commence the offer in virtual secrecy, thereby taking advantage of the element of surprise. On the other hand, in a proxy contest, the management of a target company has more notice that someone is trying...
to overthrow it, thereby affording it more time to prepare a defense.\textsuperscript{38} With their increasing popularity, it was simply a matter of time before the courts would take up the matter of tender offers. However, as examined below, determining when a tender offer exists has proved to be no easy task for the courts.

\section{A. Tender Offer Defined}

In accordance with congressional intent, a concrete definition of a tender offer does not exist.\textsuperscript{39} While some texts attempt to define a tender offer in a few sentences, the various definitions only state some general characteristics common to most tender offers.\textsuperscript{40} The courts' struggle to determine when a tender offer exists, and when it does not, is further evidence that the definition of a tender offer is unclear.\textsuperscript{41}

In light of their struggle, many courts have relied on one of two tests to determine whether a tender offer exists. One test was developed by the SEC\textsuperscript{42} and was adopted in the well-known case of \textit{Wellman v.}}

\begin{footnotesize}
\textsuperscript{38} \textit{See id.} In a proxy contest, a dissident shareholder has two options available to access shareholders. First, the dissident could have the corporation mail the proxies to the shareholders for them at the dissident's expense. \textit{See 17 C.F.R. § 240.14a-7} (2000). Second, the dissident could request the shareholder list from the corporation and mail the proxies out him or herself. \textit{See id.} Since it is likely that management will not be amenable to the dissident's position, it is not likely to hand over the shareholder list. \textit{See KLEIN & RAMSEYER, supra} note 4, at 493. Consequently, the dissident is forced to have the corporation mail the proxies and therefore gives the corporation additional time to prepare a defense to the proxy contest. \textit{See S. REP. No. 90-510, at 2} (1967) (discussing how cash tender offers allow a bidder to act in complete secrecy so that a target has no opportunity to implement a defense). Notably, many state securities laws require a corporation to hand over the shareholder list to a shareholder that asks for it, subject to certain constitutional requirements. \textit{See Sadler v. NCR Corp.}, 928 F.2d 48, 55 (2d Cir. 1991). Regardless, the corporation is still on notice that someone is trying to overthrow them.

\textsuperscript{39} \textit{See Takeover Bids, supra} note 29, at 18.

\textsuperscript{40} \textit{See, e.g., BLACK'S LAW DICTIONARY} 1480 (7th ed. 1999) (defining tender offer as "[a] public offer to buy a minimum number of shares directly from a corporation's shareholders at a fixed price, usu[ally] at a substantial premium over the market price, in an effort to take control of the corporation").


\end{footnotesize}
The second test was developed in *S-G Securities, Inc. v. Fuqua Investment Co.* In analyzing the two tests, it is useful to set forth a brief synopsis of the facts of each case.

1. The *Wellman* Test

In *Wellman*, the Board of Directors ousted defendant Dickinson from his position as Chairman of the Board at Becton, the corporation at issue. In an attempt to apply pressure on management and regain control of Becton via a tender offer, Dickinson sought financial assistance from Sun Company, Inc. ("Sun").

To acquire the 34% of Becton’s stock that Sun desired, Sun determined it was best to buy the 15% held by Dickinson and a few others and to conduct a limited solicitation of Becton’s institutional shareholders for the remainder. Sun concluded that this method would be the quickest and quietest. The offer provided two tender options to the shareholders: $45 per share with no recourse should the final offer price be higher, or $40 per share with the right to receive the highest price paid to any solicitee thereafter.

After acquiring the initial 15%, Sun initiated telephone solicitations of institutional investors for the remaining shares. Solicitors informed each of the prospective solicitees that no transaction was final unless Sun acquired 20% of the shares, notified them of the two-tier price structure, and told them that a hurried response was essential.

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43. 475 F. Supp. 783 (S.D.N.Y. 1979), aff’d, 682 F.2d 355 (2d Cir. 1982). The District Court initially adopted the test. See id. at 824.
45. *See Wellman*, 475 F. Supp. at 799 (stating that Dickinson was ousted for his desire “to bring about a change in management” at Becton and how he “was deposed as chairman and nudged out the back door with the title of Honorary Chairman” by other members of the company’s board).
46. See id. at 805-06.
47. See id. at 805.
48. See id. at 806.
49. See id. at 808. This type of tender offer is known as a coercive tender offer. See Gregg H. Kanter, Comment, *Judicial Review of Antitakeover Devices Employed in the Noncoercive Tender Offer Context: Making Sense of the Unocal Test*, 138 U. Pa. L. Rev. 225, 238 n.20 (1989). In a coercive tender offer, shareholders are coerced into selling their shares at a price they believe is inadequate because once the offeror obtains the percentage of shares he or she desires, he or she will no longer have an incentive to offer a premium to the remaining shareholders. See id. While coercive tender offers were legal at the time of *Wellman*, SEC Rule 14d-10 has effectively rendered them illegal. See 17 C.F.R. § 240.14d-10(a)(2) (2000). This rule, promulgated by the SEC, entitles all tenderors to the highest price paid for any shares tendered in the tender offer. See id.
50. See *Wellman*, 475 F. Supp. at 809.
51. See id. at 810.
Ultimately, Sun successfully obtained the 34% of Becton's shares it desired.  

Thereafter, Becton commenced litigation that resulted in judgment against Sun for failing to comply with the disclosure requirements of § 14(d) of the Exchange Act. Among his many defenses, Dickinson argued that the acquisition of shares was privately negotiated, and therefore not subject to the provisions of the Williams Act. The court, using a seven-factor test, held that the transaction constituted a tender offer, and concluded that the Williams Act governed the transaction at issue.

The court specified the following factors as relevant to determining whether a tender offer existed:

1. Active and widespread solicitation of public shareholders for the shares of an issuer;
2. Solicitation made for a substantial percentage of the issuer's stock;
3. Offer to purchase made at a premium over the prevailing market price;
4. Terms of the offer are firm rather than negotiable;
5. Offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;
6. Offer open only a limited period of time;
7. Offeree subjected to pressure to sell his stock.

When all of the factors are present in a specified transaction, there is a strong indication that a tender offer exists. Significantly, however, the court explained that the aforementioned factors do not all need to be present for a tender offer to exist. Depending upon the circumstances of a particular case, the court may afford more weight to some factors because they "may be more compelling and determinative than ...
others." After determining that all seven factors were present in the case before it, the court concluded that a tender offer existed.

While the Wellman test is widely accepted, it is not without its critics. One court rejected the test stating that "the elevation of such a list to a mandatory 'litmus test' appears to be both unwise and unnecessary." That court believed the test was too variable and instead opted to analyze the statutory purpose of §14(d) of the Exchange Act to determine whether a tender offer existed. Interestingly, immediately after rejecting the Wellman test, the court informally discussed all of the factors comprising the Wellman test and concluded that because none of the factors had been met, the offerees were not entitled to the protection of the Williams Act.

2. The S-G Securities Test

Many courts have also used a test derived in S-G Securities, Inc. v. Fuqua Investment Co. to determine if a tender offer exists. In S-G Securities, Fuqua Investment Company ("FIC") sought control of S-G Securities, Inc. ("S-G"). On two separate occasions, FIC issued a public announcement over the Dow Jones broad tape concerning a possible tender offer for S-G common stock, however, S-G rejected the offer.
both times.\textsuperscript{69} Approximately two months after the initial public offer to buy S-G's shares, FIC announced that it not only had acquired 28.5\% of S-G's shares, but that it intended to gain "operating" control of S-G in a series of privately negotiated transactions and open market purchases.\textsuperscript{70}

One of the principal issues before the court was whether FIC's stock purchases were subject to the filing and disclosure provisions of the Williams Act.\textsuperscript{71} The court recognized that the transactions at issue did not fall within the traditional definition of a tender offer, but it also recognized that the Williams Act is liberally interpreted where the transactions at issue pose the same potential dangers that the Williams Act was designed to prevent.\textsuperscript{72}

The court noted the significance of the widely publicized press announcements that preceded FIC's purchases when it stated that "[t]his publicity created a risk of the pressure on sellers that the disclosure and remedial tender offer provisions of the Williams Act were designed to prevent."\textsuperscript{73} In enjoining FIC from voting those shares it obtained, or from acquiring additional shares until it offered rescission for certain purchases, the court developed a two-part test to determine whether a tender offer exists.\textsuperscript{74} The court held that a tender offer exists when there is:

1) [A] publicly announced intention by the purchaser to acquire a substantial block of the stock of the target company for purposes of acquiring control thereof, and

2) a subsequent rapid acquisition by the purchaser of large blocks of stock through open market and privately negotiated purchases.\textsuperscript{75}

The \textit{S-G Securities} test therefore focuses on the pressure that public offers place on public shareholders to sell their securities quickly and without adequate information.\textsuperscript{76} Similar to the \textit{Wellman} test, the \textit{S-G Securities} test has been accepted by many courts.\textsuperscript{77} The Ninth Circuit,
however, criticized the *S-G Securities* test as "vague and difficult to apply."\(^7\) It stated that the test offers minimal value in guiding the issuer through the provisions of the Williams Act.\(^7\) In addition, the Ninth Circuit typified it as "largely subjective and made in hindsight based on an ex post facto evaluation of the response in the marketplace to the repurchase program."\(^5\)

As discussed, the courts have struggled to determine when a tender offer exists because Congress determined that it would be best to let the securities laws adapt to changing times. Nevertheless, courts generally use the two tests detailed above to assist them in determining when they should classify a transaction as a tender offer. While neither test is perfect, both have a certain element of flexibility that allows courts to recognize a tender offer in all of its various forms in order to necessarily carry out the intentions of Congress.

**B. The Federal Securities Laws**

Courts have had many opportunities to determine whether a particular transaction constitutes a tender offer,\(^5\) however, federal judicial interpretation of securities laws was not common until the mid-1930s when Congress enacted federal securities regulations.\(^2\) Prior to 1933, securities were regulated, to the extent that they were regulated, only by the individual states.\(^3\) The necessity for the rapid introduction of federal securities laws arose from the Great Depression.\(^4\)

1. The Securities Act and the Exchange Act

The Stock Market Crash of 1929 resulted in a substantial loss of investor confidence in the market.\(^5\) To regain the confidence of investors that Wall Street once experienced, Congress determined that


\(^{78}\) SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 953 (9th Cir. 1985).

\(^{79}\) See *id.*

\(^{80}\) *Id.* (emphasis omitted).

\(^{81}\) See *supra* Part II.A.

\(^{82}\) See *AFTERMAN*, supra note 16, at 7.

\(^{83}\) Most states had "blue-sky laws" that prohibited the "offering of securities if it is judged not to be 'fair, just, and equitable.'" *Id.* These laws focused on the investment practice of "attemp[ing] to sell securities in entities with not much more substance than the blue sky above to unwitting investors." *Id.*

\(^{84}\) See *id.* at 1.

\(^{85}\) See *CLARkson*, supra note 4, at 860.
the time was ripe to enact federal securities laws. Congress' efforts resulted in the enactment of two principal pieces of federal securities legislation: the Securities Act and the Exchange Act.

In composing the Securities Act, Congress focused on distributing securities as opposed to trading securities. The primary goal of the Securities Act was to "require issuers of new securities to disclose to the public all relevant facts needed for an intelligent evaluation of the risks and prospects of ownership" of the security. Because tender offers concern the trading of securities rather than the issuing of new securities, tender offers are governed by the Exchange Act. Accordingly, this Note focuses on the efficacy of the Exchange Act.

Realizing the need to regulate securities transactions, Congress ratified the Exchange Act in 1934, just one year after it enacted the Securities Act. In enforcing the various federal securities laws, the Supreme Court has had the opportunity to interpret Congress' intent on many occasions. Significantly, the Court has stated that "[a] fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry." To carry out its intent, Congress created the SEC and afforded it the power to administer the federal securities laws as well as prescribe rules necessary to carry out such intentions.

While there were numerous motivating factors in instituting the Exchange Act, four are particularly relevant to tender offers and are the focus of this Note. The four factors include: (1) mandating continuous disclosure with respect to those securities registered under the Securities Act; (2) ensuring regulation of the securities markets themselves; (3)
preventing fraudulent activities and manipulation of the markets; and (4) regulating the communications with shareholders.95

While the Exchange Act was successful in boosting investor confidence, Congress had yet to deal with another investment tool, the tender offer.96 Thirty-four years after Congress enacted the Exchange Act, fraudulent activities and communications with shareholders were all too common in tender offer transactions.97 Consequently, in 1968, Congress realized the necessity for further legislation and, therefore, passed the Williams Act.98

2. The Williams Act

The Williams Act added §§ 13(d),100 13(e),101 14(d),102 14(e),103 and 14(f)104 to the Exchange Act.105 The need for the Williams Act was clear. Before the Williams Act, federal securities laws heavily regulated many of the common takeover methods except for cash tender offers.106 For example, stock for stock exchanges and stock tender offers107 are regulated by the Securities Act, which requires they be registered.108 The Exchange Act mandates disclosure when someone initiates a proxy contest.109 Nonetheless, an individual or company could make a cash

96. See id. Proxy contests are an example of regulating communications with shareholders. See id.
97. See SODERQUIST & GABALDON, supra note 10, at 125-27 (describing the creation of the Williams Act to focus on tender offers).
98. See S. REP. No. 90-550, at 3 (1967) (finding that with cash tender offers, "no information need[ed] to be filed or disclosed to shareholders [rendering] the investment decision—whether to retain the security or sell it—... in substance little different from the decision made on an original purchase of a security, or on an offer to exchange one security for another").
99. See SODERQUIST & GABALDON, supra note 10, at 125.
101. See id. § 78m(e).
102. See id. § 78n(d).
103. See id. § 78n(e).
104. See id. § 78n(f).
105. See SODERQUIST & GABALDON, supra note 10, at 125-26. Sections 13(e) and 14(f) are not applicable to this Note and, therefore, will not be discussed. Section 13(e) applies to security purchases by the issuer. See 15 U.S.C. § 78m(e). Section 14(f) pertains to the election of a majority of directors by a beneficial owner of more than 5% at a meeting other than one of security holders. See id. § 78n(f).
107. A stock tender offer is a takeover method “in which the acquiring company offers its securities in exchange for shares in the target” company. SODERQUIST & GABALDON, supra note 10, at 125.
109. See id. at 3.
tender offer\textsuperscript{10} without any requirement to file or disclose information concerning their intentions.\textsuperscript{11}

Through the adoption of the Williams Act, Congress ensured that adequate information would also be readily available to the shareholder when an investor made a cash tender offer.\textsuperscript{12} Moreover, the Williams Act guaranteed that shareholders would no longer have to act hastily and without full disclosure of information because it provided them with sufficient time to carefully assess the relevant facts.\textsuperscript{13} Notably, the United States Supreme Court has held that the Williams Act should be interpreted broadly to effectuate its remedial purpose.\textsuperscript{14} With the knowledge that Congress intended to promote full and fair disclosure in tender offer transactions, the specific provisions of the Williams Act can be analyzed to determine whether, in fact, it has been successful.

Section 13(d) of the Williams Act applies to tender offers only indirectly.\textsuperscript{15} It requires a person who acquires more than 5\% of any security registered pursuant to the Securities Act to file a statement of intention.\textsuperscript{16} The statement must include, among other details, information pertaining to the identity of the acquiror, the nature and purpose of such beneficial ownership, and the number of shares of such security which are beneficially owned.\textsuperscript{17} The primary purpose behind § 13(d) is to provide notice to the current management of a target company that someone has gained a substantial percentage of the company's stock and to make it aware of this person's intentions with respect to changing the corporate structure.\textsuperscript{18} By requiring such disclosure, a target company's management could best protect its shareholders' investment interests.\textsuperscript{19} Tender offers relate only indirectly to § 13(d) in that it must be read in conjunction with other provisions of the Williams Act.\textsuperscript{20}

\textsuperscript{10} A cash tender offer is a takeover method in which the acquiring company offers cash for the securities of the target company. See SODERQUIST & GABALDON, supra note 10, at 125.

\textsuperscript{11} See S. REP. NO. 90-550, at 2-3.

\textsuperscript{12} See S. REP. NO. 90-550, at 2.


\textsuperscript{15} See SODERQUIST & GABALDON, supra note 10, at 126.


\textsuperscript{17} See id. § 78m(d)(1).


\textsuperscript{19} See H.R. REP. NO. 90-1711, at 3-4.

\textsuperscript{20} See id. at 10; SODERQUIST & GABALDON, supra note 10, at 126 (referring specifically to § 14(d) of the Williams Act, which prohibits tender offers for registered securities if success in the
Section 14(d) of the Williams Act focuses specifically on the concerns that gave rise to the Exchange Act, but in relation to cash tender offers. In pertinent part this section states:

It shall be unlawful for any person, directly or indirectly . . . to make a tender offer for, or a request or invitation for tenders of, any class of any equity security . . . if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time . . .

In analyzing this section, it is clear that Congress intended to promote full and fair disclosure of information when an investor makes a tender offer. If an investor offers to purchase more than 5% of a corporation's shares, the investor must abide by the disclosure rules set forth in § 13(d). Additionally, under § 14(d)(5), as supplemented by SEC Rule 14d-7, shareholders may change their minds after deciding to tender their shares. To wit, this permits a shareholder to withdraw his or her tender at any time before the offer closes if he or she determines that the offer is not a good value.

121. The Exchange Act was created to guarantee disclosure, and therefore, prevent fraudulent transactions. See supra notes 95-96 and accompanying text. Section 14(d) of the Williams Act purports to do the same in the context of cash tender offers. See H.R. REP. No. 90-1711, at 2-4.
122. 15 U.S.C. § 78n(d)(1). As used in this subsection, "person" may include "a partnership, limited partnership, syndicate, or other group." Id. § 78(d)(2).
123. Id. § 78n(d)(5); see also 17 C.F.R. § 240.14d-7 (2000) (defining the time period in which a shareholder may withdraw his or her tender as equal to the duration of the tender offer).
124. See 15 U.S.C. §§ 78m(d), n(d).
To further regulate the information disclosed pursuant to §§ 13(d) and 14(d), Congress set forth § 14(e), commonly known as the antifraud provision. This section states:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.\(^{127}\)

Essentially, two types of actions exist under this section. A shareholder may bring a cause of action either where the tender offer omits a material fact, or where the tender offer gives fraudulent, misleading, or deceptive information.\(^ {128} \) In addition, Congress empowered the SEC to promulgate rules and regulations to prevent such fraudulent, deceptive, or misleading acts from occurring under this section.\(^ {129} \) In other words, the SEC has the power to enact rules to stop fraudulent activities that Congress has not specifically covered under the Williams Act.\(^ {130} \)

Significantly, Congress did not set a minimum threshold that a person must acquire for the rubric of § 14(e) to apply.\(^ {131} \) While a tender offer must be for more than 5% for § 14(d) to apply,\(^ {132} \) § 14(e) applies to any tender offer, whether it is for more or less than 5%.\(^ {133} \) The impact of § 14(e) is that it “adds a ‘broad antifraud prohibition’” to the federal securities laws.\(^ {134} \) The Supreme Court has accordingly interpreted that Congress’ intent in enacting this antifraud provision was to conclusively

\(^{127}\) See id. § 78n(e).

\(^{128}\) See id.

\(^{129}\) See id.

\(^{130}\) See id.; see also H.R. REP. NO. 90-1711, at 7 (1968) (conferring express authority on the SEC to issue rules and regulations in the public interest and for investor protection regarding the prevention of fraudulent, deceptive, or manipulative acts and practices, as well as rules and regulations regarding a corporation’s purchase of its own securities).

\(^{131}\) See 15 U.S.C. § 78n(e).

\(^{132}\) See id. § 78n(d).

\(^{133}\) See id. § 78n(e).

demand that all tender offerors make full and fair disclosure of material information to those with whom they deal. 135

The Williams Act has been successful in regulating tender offers that seek more than 5% of a company's shares. 135 Nevertheless, the Williams Act, with the exception of § 14(e), does not govern mini-tender offers. Thus, the question presented is whether mini-tender offers specifically require further regulation.

III. THE DEVELOPMENT OF MINI-TENDER OFFERS

Consider the following hypothetical. Suppose you were the Chief Executive Officer of RJBB, Inc., ("RJBB"), a publicly held corporation with one million shares outstanding. Specializing in the manufacture of cast stone, RJBB had recently escaped filing for bankruptcy and has since made a substantial turnaround because of internal changes. Headed out of the red and into the black, the future of RJBB was looking brighter than ever and Wall Street was predicting good times for the company.

Suddenly, one Monday morning, an influx of telephone calls and e-mails arrive at the company asking whether the company was merging. One e-mail inquires whether the company was being taken over. A caller asks, "did the Board approve the merger?" The inquiries go on and on: "Is there an emergency shareholder’s meeting?" "Someone wants to buy my shares of the company and I have to respond fast; what should I do?" "The offer is first-come, first-served and if I do not respond quickly, I will not have an opportunity to tender my shares." "Why is someone offering to buy my shares from me?" "What is going on?" "What should I do?"

Hundreds, maybe thousands, of telephone calls inundate the switchboard. They are calls from shareholders who want answers, and they want them immediately. They want the answers that you do not have. "A merger?" you ask. "What on earth are they talking about?" You immediately put together a risk assessment team to ascertain what is going on. The company’s reputation cannot afford another setback right now, not so soon after narrowly escaping bankruptcy.

135. See id. at 11.

136. See Richard A. Booth, The Problem with Federal Tender Offer Law, 77 CAL. L. REV. 707, 712-13 (1989) (noting that "[a]lthough the Williams Act may to some extent have achieved the goal of equal treatment for shareholders, it ... can be easily evaded, and thus it does not in fact assure equal treatment among shareholders"). The Williams Act may be evaded, and its benefits to shareholders lost, if the bidder chooses a bid structure not governed by the Act. See id. at 715.
By early Monday evening, the risk assessment team discovers that BH Holdings, Inc. ("BH Holdings") has made a "mini-tender offer" for approximately 4.9% of RJBB's shares. Astoundingly, you determine that the offer is for $11 per share, $9 less per share than the stock is currently trading at on the market. The entire board of directors is shocked and bewildered: What shareholder would tender his or her shares for less than he or she could sell them for on the market? No one, unless maybe he or she suspects BH Holdings has inside information, in which case it is best to salvage some profit or minimize losses. However, that is not the case here, BH Holdings does not have inside information. BH Holdings is clearly trying to mislead and exploit the shareholders of RJBB.

The risk assessment team determines that RJBB must issue a press release to warn its shareholders of the deceptive methods of BH Holdings, the offeror. The team composes a release that denies any involvement in a merger, states that RJBB is in no way affiliated with BH Holdings, and warns that shareholders should scrutinize its offer because it is neither fair nor equitable and it is misleading.

Nevertheless, it is too late. Hundreds of smaller shareholders have tendered their shares because they thought they were getting a good deal. The shareholders figured that BH Holdings knew something about RJBB that they did not; perhaps RJBB was really going bankrupt this time. Those that had tendered their shares did not want to miss what they thought would be at least some profit. The cost to RJBB amounts to thousands of dollars due to the time and money spent on the risk assessment team and on issuing the press release. Fortunately, the company has escaped irreparable injury this time, but what about the next time?

Is RJBB entitled to such detailed information as provided in § 14(d) concerning a beneficial owner of more than 5% of the company’s stock, even though BH Holdings made an offer for less than 5%? Moreover, do the shareholders of RJBB have a right pursuant to § 14(e) to be informed that the mini-tender offer proposed to them is for significantly less than the market price? These questions and more are analyzed in the remainder of this Note.

137. See supra notes 2-9 and accompanying text (defining a mini-tender offer).
138. Section 14(d) applies only to tender offers that would result in the offeror acquiring more than 5% ownership of any security registered pursuant to the Securities Act. See 15 U.S.C. § 78m(d) (1994).
139. Section 14(e) of the Securities Act requires that an offeror make disclosures regarding the offer that are not fraudulent, misleading, or deceptive. See id. § 78n(e).
Characterized as the "Holy Grail," some believe mini-tender offers are the answer to "finding a way to make money with virtually no risk." Mini-tender offers are a relatively new phenomenon, yet they have become popular at an astounding rate. The number of mini-tender offers processed by the Depository Trust Company ("DTC") grew 137% from 1997 to 1998.

A. Mini-Tender Offer Defined

Because the concept of a mini-tender offer is relatively new, a precise definition has not been established. While several characteristics of a mini-tender offer are similar to that of a tender offer, mini-tender offers also have distinctive characteristics of their own. In formulating a definition for a mini-tender offer, it is best to do so through the guise of the Wellman test and the S-G Securities test.

The factors the Wellman court set forth to ascertain whether a tender offer exists that are common to a mini-tender offer include: (1) an "active and widespread solicitation of public shareholders for the shares of an issuer"; (2) the "terms of the offer are firm rather than negotiable"; (3) the "offer [is] contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased"; (4) the "offer [is] open [for] only a limited period of time"; and (5) the "offeree [is] subjected to pressure to sell his stock." Three features pertaining to a mini-tender offer are, however, notably different. First, and perhaps the most disconcerting difference between tender offers and mini-tender offers, is that mini-tender offers

140. Martinez, supra note 5.
141. See id. (noting that in six months, mini-tender offers were sent to dozens of companies; see also Barbara Martinez, SEC Approves Request to Charge Fees for Processing of Minitender Offers, WALL ST. J., Feb. 12, 1999, at B13.
142. The Depository Trust Company ("DTC") is the central depository for the nation's securities. See Martinez, supra note 5.
143. Martinez, supra note 141.
144. Most likely, mini-tender offers will not develop a concrete definition for the same reasons no definitive definition exists for tender offers. See supra Part II.A (discussing congressional intent to leave the term tender offer undefined).
145. See infra note 149 and accompanying text.
146. See infra notes 151-60 and accompanying text.
147. See Wellman v. Dickinson, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979), aff'd, 682 F.2d 355 (2d Cir. 1982); see also supra Part II.A.1 (discussing the background of tender offers and the eight factor test developed by the SEC and adopted by the Wellman court).
are made at a discount to the prevailing market price, while typical tender offers are made at a premium in order to induce shareholders to tender their shares.

Second, in a mini-tender offer, the offeror generally sets a maximum number of shares that he or she will accept, whereas in a tender offer, the offeror will not proceed with the offer unless he or she obtains the desired minimum number of shares, although the number of shares that is accepted is generally capped. The threshold in a mini-tender offer is set at a maximum of just below 5% of the issuer's stock so that the offeror need not comply with most provisions of the Williams Act. Because the primary purpose underlying mini-tender offers is to make a quick profit, a mini-tender offeror does not need or desire a substantial percentage of the outstanding stock. Conversely, in a tender offer, the offeror wants a substantial percentage of the issuer's stock in order to gain control of the company.

The third significant difference involves the ability of the investor to change his or her mind. Unlike a shareholder in a tender offer who can withdraw their tender, once an investor decides to tender his or her shares in a mini-tender offer, there is generally no opportunity to recall them.

Examining a mini-tender offer under the principles set forth in the S-G Securities test is somewhat more difficult than under the Wellman test because the former test is rather vague. Part one of the S-G Securities test states that a tender offer is a public announcement to acquire a substantial block of the target company for purposes of seeking control. While both a mini-tender offer and a tender offer are made through public announcements, a mini-tender offer is not executed to acquire control of the target company. Generally, the primary objective

150. See Martinez, supra note 5.  
151. See Wellman, 475 F. Supp. at 823; Interpretive Release, supra note 7, at 46,583.  
152. See Martinez, supra note 5; infra note 168 and accompanying text.  
153. See Wellman, 475 F. Supp. at 823.  
155. See, e.g., Wellman, 475 F. Supp. at 805-06 (describing how the defendant sought to obtain a controlling share of the company's stock through a tender offer in order to regain control).  
156. See 17 C.F.R. § 240.14d-7 (2000) (permitting a shareholder to withdraw his or her tender at any time so long as the tender offer remains open).  
159. See generally Martinez, supra note 5 (explaining that the reason one makes a mini-tender offer is for a quick profit at low cost).
of a mini-tender offer is to acquire up to 4.9% of a company’s securities and then sell them within a short amount of time to make a quick profit.\footnote{160}

Part two of the \textit{S-G Securities} test suggests that a tender offer is more likely to exist when the public announcement is followed by a “rapid acquisition . . . of large blocks of stock through open market purchases and privately negotiated purchases.”\footnote{161} Here, there is more flexibility in analyzing a particular transaction than in part one of the \textit{S-G Securities} test. A court could justifiably conclude that an acquisition of a company’s security in blocks of up to 4.9% amount to a tender offer because those blocks may be “large” when viewing the transaction in light of the totality of the circumstances.

A mini-tender offer is not a transaction that traditionally falls within the definition of tender offer; however, this is not fatal to applying the Williams Act. The \textit{S-G Securities} court developed its test because it had come across a transaction that was not within the bounds of a traditional tender offer, but was one that the Williams Act had intended to govern.\footnote{162} In due course, a court could, and should, logically expand the definition of a tender offer to include mini-tender offers in order to further implement the remedial nature of the Williams Act.\footnote{163}

A court is likely to apply either the \textit{Welshman} test or the \textit{S-G Securities} test should litigation concerning mini-tender offers ever proceed as far as trial. To this date, most investors, unless they have been directly subjected to a mini-tender offer of this type, have never heard of them.\footnote{164} The idea of tendering shares below market prices is ridiculous to the experienced investor;\footnote{165} however, as detailed below, it is the inexperienced investor and the target company that need enhanced protection under the Williams Act.

\footnote{160. See id. Note that § 16(b) of the Exchange Act which sets forth a prophylactic rule against such “short swing profits,” is a non-issue here. See 15 U.S.C. § 78p(b) (1994) (regulating profits from a purchase and sale of security within six months). The person acquiring the shares through the mini-tender offer is generally not an officer or director, and he or she is not likely to be a 10% beneficial owner at the time of the purchase and sale, rendering this section inapplicable. See id.}

\footnote{161. \textit{S-G Sec., Inc.}, 466 F. Supp. at 1127.}

\footnote{162. See id. at 1124.}

\footnote{163. See \textit{Schreiber v. Burlington N., Inc.}, 472 U.S. 1, 8 (1985) (interpreting the Williams Act to protect public shareholders); \textit{Tcherepnin v. Knight}, 389 U.S. 332, 336 (1967) (holding that the Williams Act is remedial because its purpose is to protect public shareholders).}

\footnote{164. See Martinez, supra note 5 (“The minitender-offer system is so basic that it’s a wonder no one thought of it before.”).}

\footnote{165. See id.}
B. Making a Mini-Tender Offer

Because mini-tender offers attempt to buy a company’s shares at a discount, they have generated substantial controversy throughout the securities industry. The process of making a mini-tender offer “is so basic that it’s a wonder no one thought of it before.” Using the hypothetical set forth above, the simplicity of making a mini-tender offer is easily illustrated.

Recall that RJBB was trading at $20 per share and had one million shares outstanding at the time of the mini-tender offer. The mini-tender offer made by BH Holdings, however, was for $11 per share, and it sought only 4.9% of RJBB’s outstanding shares. To commence the transaction, BH Holdings would send a letter to the DTC offering to buy up to 4.9% percent of RJBB at $11 per share. The letter might include the name of the company making the offer, the offering price, a brief statement indicating that the offer is first-come, first-served, and instructions on how a shareholder can tender his or her shares.

For a fee of $2700, the DTC would then forward BH Holdings’ offer to its participants, which include hundreds of banks and brokerage firms. As part of their fiduciary duty, the brokerage firms must disseminate the mini-tender offer information to their clients. Upon receipt of the mini-tender offer, the shareholders of RJBB must make an “informed” decision about whether to tender their shares.

The process is that simple. Because the mini-tender offer is for below 5% of RJBB, BH Holdings does not need to comply with most of the securities regulations set forth in the Williams Act. Although this simplifies the mini-tender offer process significantly, noncompliance

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166. See Mini Tender Offers, supra note 154.
167. See Martinez, supra note 5.
168. Id.
170. See Martinez, supra note 141. Interestingly, the DTC did not charge mini-tender offerors a fee for processing the mini-tender offers until the SEC approved their request in February 1999. See id. The DTC stated that the recent flood of mini-tender offers has required them to charge a fee to cover the administrative costs. See id. However, in a tender offer, the DTC charges the tenderor a fee to cover its administrative costs. See id. The DTC explains the disparate treatment by stating that the number of acceptances in a mini-tender offer is much smaller and the DTC has found that it cannot cover its costs without charging the mini-tender offeror a fee. See id.
171. See Martinez, supra note 5.
172. See, e.g., Conway v. Icahn & Co., Inc., 16 F.3d 504, 509-10 (2d Cir. 1994) (citing the RESTATEMENT (SECOND) OF AGENCY § 381 (1958)).
173. See supra Part II.B.2. It is important to note that § 14(e) of the Williams Act applies regardless of the percentage sought through a mini-tender offer. See 15 U.S.C. § 78n(e) (1994).
with the Williams Act presents a myriad of problems for the target companies and their individual shareholders.

C. The Significance of Mini-Tender Offers

By the time the shareholder receives the mini-tender offer, it has been edited and shortened significantly by the DTC and various brokerage houses. An investor cannot make an informed decision on whether to tender his or her shares if the mini-tender offer does not provide sufficient material information therein. The inability to make an informed and educated decision has had a significant impact on both the targeted companies and their individual shareholders.

The lack of adequate information in a mini-tender offer has resulted in significant costs, both tangible and intangible, to the target companies and their investors. Some of these costs include lost profits, money spent on strategy sessions, and diminished investor confidence. Table 1 illustrates a random sample of the mini-tender offers that have been made with respect to various companies. As illustrated, the most discounted mini-tender offer was 47% below the market price at the time of the mini-tender offer, while the least discounted was 14%. The importance of these numbers can readily be seen if applied to the aforementioned hypothetical.

The mini-tender offer made to the shareholders of RJBB was for $11 per share while the market price was $20 per share. This reflects a 45% discount to the actual trading price of RJBB’s stock. Recall that RJBB has one million shares outstanding; thus, 4.9% (remaining outside the scope of the Williams Act) of that one million is 49,000 shares. Assuming the market price remains at $20 per share, if the offeror were to flip the shares within a few days, he or she would gain a gross profit of $441,000.

This is a great profit for the mini-tender offeror; yet it is an even greater loss for the shareholders that were duped by this fraudulent practice. If that number is multiplied by the number of companies

174. See Martinez, supra note 5.
175. See Martinez, supra note 169.
176. See Telephone Interview with Debbie Burns, Manager Investor Relations, Friendly’s Ice Cream Corp., Inc. (Sept. 1, 1999); Telephone Interview with Mark Southhurst, Vice-President, General Counsel, and Secretary, Greyhound Lines (Sept. 1, 1999).
177. See infra app. tbl.1.
178. See infra app. tbl.1.
making mini-tender offers, the profits rise to millions of dollars. More significantly, every dollar "earned" by the mini-tender offeror is a dollar lost by the shareholders of the target companies.

The costs incurred by the companies and their individual shareholders take on several forms. The most obvious cost to the individual shareholder is the profit he or she would have made if he or she had tendered his or her shares at the market price rather than for below the market price. The other costs incurred by the shareholder are not tangible, yet they have the potential of affecting the stability of the market in the long run. For example, the costs associated with being exploited and defrauded are detrimental to an efficient market. Common sense dictates that when an individual has been exploited, he or she will be less inclined to trust or place faith in the cause of the deception. Therefore, an investor is likely to be less confident in the securities markets after being exploited and, ultimately, fewer people will make investments, which will hurt the economy in the long run.

Not only are there costs associated with the shareholders, but the target companies incur substantial expenses as well. Some of the most burdensome costs associated with the mini-tender offer for companies are time spent on conducting strategy meetings and developing and issuing press releases. Protecting the company’s reputation and reassuring the shareholders that the company is functioning well are the primary reasons for these costs. Other costs include time spent on the telephone with the SEC, broker-dealers, and other companies facing mini-tender offers. While recorded empirical data of these costs appears to be nonexistent, companies that have been subjected to mini-
tender offers estimate that responding to the mini-tender offer cost them thousands of dollars.\textsuperscript{185}

The number of mini-tender offers made is growing exponentially. In 1997, 39 mini-tender offers were processed.\textsuperscript{185} Just one year later, in 1998, that number grew over 1277\% to 537.\textsuperscript{183} In the first five weeks of 1999, 300 mini-tender offers had been received by the DTC.\textsuperscript{183} If that rate continues, a projected 3120 mini-tender offers will be made in 1999.\textsuperscript{185} Evidencing a direct relationship, as the number of mini-tender offers grows, the costs to the targeted companies and their shareholders grows as well. In 1998, the costs amounted to thousands of dollars.\textsuperscript{173} In 1999, it will likely grow to hundreds of thousands of dollars. If the amount of mini-tender offers continues to grow at the present rate, the costs will exceed one million dollars by next year.

The time to act is now; the SEC must not permit these mini-tender offers to continue. They are a fraudulent and deceptive practice that results in the destruction of a company's reputation as well as in substantial costs to the shareholders and targeted companies. Target companies and their shareholders cannot afford to be attacked by mini-tender offers.

IV. THE SEC'S RESPONSE

Thus far, the SEC has initiated three lawsuits concerning mini-tender offers: \textit{IG Holdings, Inc.},\textsuperscript{191} \textit{Peachtree Partners},\textsuperscript{192} and \textit{City Investment Group, LLC}.\textsuperscript{193} Additionally, the SEC has recently issued an interpretive release, which attempts to explain what the SEC views as

\begin{itemize}
  \item \textsuperscript{185} See Telephone Interview with Debbie Burns, \textit{supra} note 176; Telephone Interview with Mark Southhurst, \textit{supra} note 176.
  \item \textsuperscript{186} See Martinez, \textit{supra} note 141.
  \item \textsuperscript{187} See \textit{id.}
  \item \textsuperscript{188} See \textit{id.}
  \item \textsuperscript{189} According to the available data, the number of mini-tender offers processed in the first five weeks of 1999 was approximately sixty per week. \textit{See id.} At that rate, approximately 3120 mini-tender offers will be processed in 1999. \textit{See id.}
  \item \textsuperscript{190} See Telephone Interview with Mark Southhurst, \textit{supra} note 176; Telephone Interview with Debbie Burns, \textit{supra} note 176.
  \item \textsuperscript{191} Exchange Act Release No. 41,759, 70 SEC Docket 832 (Aug. 19, 1999) (order instituting proceedings, making findings, and imposing a cease and desist order) [hereinafter IG Holdings Order].
  \item \textsuperscript{192} Exchange Act Release No. 41,760, 70 SEC Docket 834 (Aug. 19, 1999) (order instituting proceedings, making findings, and imposing a cease and desist order) [hereinafter Peachtree Partners Order].
  \item \textsuperscript{193} Exchange Act Release No. 42,919, 72 SEC Docket 1536 (June 12, 2000) (order instituting proceedings, making findings, and imposing a cease and desist order) [hereinafter City Investment Group Order].
\end{itemize}
deceptive and manipulative practices associated with mini-tender offers in violation of § 14(e) of the Exchange Act. While the SEC's actions are a step in the right direction, they are, upon thorough examination, clearly insufficient to halt the deceptive practices engaged in by deceitful investors.

A. Three Lawsuits and Their Limited Value

On August 19, 1999, the SEC instituted and settled the first-ever lawsuit concerning mini-tender offers against IG Holdings, Inc. ("IG Holdings") pursuant to § 21C of the Exchange Act. The SEC claimed IG Holdings violated § 14(e) of the Exchange Act because it did not sufficiently monitor the dissemination of the mini-tender offer and that it failed to disclose material facts. The suit settled when the SEC imposed a cease and desist order ("IG Holdings Order"), and subsequently accepted an offer of settlement from IG Holdings ("IG Holdings Settlement").

The respondent, IG Holdings, was an Arizona corporation that had consistently been in the business of investing securities, primarily by making tender offers. Over the course of approximately one year, commencing June 1998, IG Holdings made more than two hundred mini-tender offers. In making the mini-tender offers, IG Holdings included information such as the name of the target company, the size of the offer, the offering price, the date that the offer began and ended, and instructions on how shareholders could tender their shares.

These offers were prepared in one to two page documents by an information services firm, which then forwarded it to the DTC. Upon accepting the mini-tender offer, the DTC then announced the offer through an electronic announcement system. Thereafter, the DTC and
the information services firm entered into an agreement to make the offer eligible for the processing of acceptances at the DTC.²⁰⁵

Many of the DTC’s participants, generally investment banks, then notified their customers, who were the beneficial owners of the stock being sought through the mini-tender offer, of the proposed tender.²³⁰ However, in many instances, the shareholders did not receive material information from the investment banks concerning the mini-tender offers.²³⁷ For example, the investment banks did not always inform their customers that once they tendered their shares they could not withdraw their tender.²³⁸ Additionally, they were not informed that IG Holdings could revoke the offer at any time prior to completing the offer.²³⁹ Shareholders did not always know the final price they would receive from IG Holdings.²¹⁰ Furthermore, the investment banks did not always inform the shareholders that the offering price might not reflect the actual market price.²¹¹

Specifically, the SEC opined that:

IG Holdings violated Section 14(e) of the Exchange Act because the means used to disseminate its below market mini-tender offers resulted in some shareholders not receiving material information about the offers, including the calculation of the final price to be paid by IG Holdings and the warning (contained in certain IG Holdings material) that the offering price might not reflect the market price. That information was material because a reasonable investor would consider it to be important in determining whether to tender.²¹²

Accordingly, the SEC issued an order that IG Holdings must “cease and desist from committing or causing any violation and any future violation of Section 14(e) of the Exchange Act.”²¹³ Pursuant to the terms of the IG Holdings Settlement,²¹⁴ IG Holdings, without admitting or denying the findings of the SEC, consented to the issuance of the order.²¹⁵ While the

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²⁰⁵. See id.
²⁰⁶. See id.
²⁰⁷. See id.
²⁰⁸. See id.
²⁰⁹. See id.
²¹⁰. See id.
²¹¹. See id.
²¹². Id.
²¹³. Id. at 834.
²¹⁴. See IG Holdings Settlement, supra note 199; see also IG Holdings Order, supra note 191, at 1 (accepting the Offer of Settlement that IG Holdings submitted to the SEC for the administrative proceeding).
²¹⁵. See IG Holdings Order, supra note 191, at 832.
IG Holdings Order may be used in future proceedings against IG Holdings or anyone else, the IG Holdings Settlement has no binding effect on any future actions brought by the SEC or in the courts. Consequently, this settlement appears to amount to a token reprimand and a promise not to violate the antifraud provisions again.

On the same day that the SEC brought an action against IG Holdings, the SEC also issued a cease and desist order against Peachtree Partners ("Peachtree Partners Order"). The facts of this case are quite clear. Peachtree Partners, the respondent, is a general partnership with its principal offices in Phoenix, Arizona. Peachtree Partners, during the times at issue, "investing in securities, including equities, bonds and limited partnership interests, primarily by making tender offers for such securities." The SEC initiated legal proceedings against Peachtree Partners because at the time Peachtree Partners made a mini-tender offer for 4.9% of Shearson Murray Realty Fund ("Shearson"), it already owned approximately 1% of Shearson. The SEC found that "[b]ecause Peachtree Partners would have owned more than 5% of the securities after consummation of the tender offer, it was required to comply with the filing, disclosure and procedural requirements of Section 14(d) of the Exchange Act and Regulation 14D. It did not do so."

The SEC issued a cease and desist order against Peachtree Partners pursuant to § 21C of the Exchange Act, which prohibited them "from committing or causing any violation and any future violation of Section 14(d) of the Exchange Act and Regulation 14D." While the SEC issued the order declaring these practices in violation of the Williams Act, Peachtree Partners and the SEC settled the proceeding pursuant to a prior settlement where Peachtree Partners neither admitted nor denied the findings set forth by the SEC.

Although the settlement technically has precedential effect, the case against Peachtree Partners is materially different from what transpires in most fraudulent mini-tender offers, and thus, is of limited value to the issues presented in this Note. Peachtree Partners would have clearly

216. See IG Holdings Settlement, supra note 199, at 2 n.1.
217. See Peachtree Partners Order, supra note 192.
218. See id. at 834.
219. Id.
220. See id. Peachtree Partners acquired the 1% previously owned through a prior mini-tender offer. See id. at 834 n.1.
221. Id. at 834.
222. Id. at 835.
223. See id. at 834.
violated § 14(d) of the Exchange Act if it acquired more than 5% of the target company's shares and failed to file a tender offer statement. However, in most mini-tender offers, the bidder never acquires more than 5%; therefore, violations of the Exchange Act are not so lucid.

Most recently, the SEC issued a cease and desist order against City Investment Group ("City Investment Group Order"), John Barrs, and Tigran Papazian (collectively "respondents").224 The City Investment Group Order alleged that the respondents engaged in improper conduct in connection with a mini-tender offer for 2% of the outstanding common stock of Tellabs, Inc.225 The improper conduct referred to included "knowingly or recklessly disseminating materially false and misleading offering materials."226 Specifically, the "[r]espondents failed to disclose that [City Investment Group] did not have the financial ability to complete the tender offer, that the offer was contingent on financing, and that the offer would be cancelled if the market price did not exceed the offering price when the offer concluded."227

The SEC deemed the improper conduct violative of the materiality requirement of § 14(e) of the Exchange Act because a reasonable investor would consider the omitted information important in determining whether to tender.228 As in the previous two cases, respondents consented to the cease and desist order without admitting or denying the SEC's findings.229 Therefore, while the City Investment Group Order may also technically be used as precedent, its value is inherently limited.

The terms of the IG Holdings Order, Peachtree Partners Order, and City Investment Group Order make it clear that the orders have limited value in subsequent mini-tender offer cases. The problems created by the development of mini-tender offers have not been rectified and the potential for further abuse of the Williams Act clearly remains.

B. The SEC's Interpretive Release

On July 31, 2000, the SEC's interpretive release on mini-tender offers and limited partnership tender offers became effective.230 The SEC issued the release because it was concerned with inadequate disclosure

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224. See City Investment Group Order, supra note 193.
225. See id. at 1536.
226. Id.
227. Id.
228. See id. at 1537.
229. See id. at 1536.
230. See Interpretive Release, supra note 7, at 2245.
under § 14(e), specifically, "that bidders are not adequately disseminating the disclosure to security holders [and that] bidders are not paying for securities promptly at the expiration of the tender offer." In offering guidance to participants in tender offers, the SEC set forth a set of disclosure guidelines, which if abided by, will reduce the risk that the participants will violate the antifraud provisions of the Exchange Act.

The disclosure guidelines suggest that bidders should disclose: (1) "clearly if the offer price is below the market price"; (2) "if applicable, that the price may be reduced by any distributions or fees and the amount, if known"; (3) "whether security holders have the right to withdraw the shares they tendered during the offer"; (4) "whether tendered securities will be accepted on a pro rata basis if the offer is oversubscribed"; (5) "that if the target is aware of the offer, the target is required to make a recommendation to security holders regarding the offer within 10 business days of commencement"; (6) its identity and any affiliation between it and the target, if any; (7) any "plans or proposals regarding future tender offers of the securities of the same target"; (8) "whether it has the funds necessary to consummate the offer"; (9) "all material conditions to the offer"; and (10) whether the offer could be extended, whether the bidder intends to extend, and if so, the length of any extension.

Similar to the aforementioned legal proceedings brought by the SEC, the interpretive release is not likely to end the deceptive and manipulative practices associated with mini-tender offers. While the leading case on the appropriate deference afforded to administrative agencies is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, courts and scholars have not been consistent in their interpretation of how it applies to interpretive releases. Some have given *Chevron* a

231. Id. at 2247.

232. See id. at 2249.

233. Id. In other words, the SEC encourages the bidder to send the offering document to the target so that it can comply with its obligations. This suggestion is rather interesting because tender offers first originated in part because of the secrecy in which investors could conduct them. See, e.g., 5 LOSS & SELIGMAN, supra note 2, at 2129. Now, the SEC is suggesting that a tender offer should be disclosed to the target company, and the failure to do so could result in a violation of § 14(e). See Interpretive Release, supra note 7, at 2249-50.

234. Interpretive Release, supra note 7, at 2250.

235. 467 U.S. 837 (1984). Essentially, *Chevron* holds that legislative regulations should be afforded "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Id. at 844.
restrictive reading, while others have given it a more expansive reading.

The restrictive reading of *Chevron* contends "that *Chevron* deference applies only to agency interpretations issued in legislative rules or final adjudicative decisions." A narrow reading such as this has led many courts to conclude that when "an agency's interpretation is embodied in another format, such as an 'interpretive rule' or a 'policy statement' exempted from [an agency's] notice and comment provisions," automatic deference is unwarranted. On the other hand, a more expansive reading of *Chevron* requires a reviewing court to give an interpretation or policy statement that an agency issued without the notice and comment process, if reasonable, controlling weight.


238. Id. Circuits applying a narrow reading of *Chevron* to SEC Interpretive Releases include: Downey v. Crabtree, 100 F.3d 662, 666 (9th Cir. 1996) (rejecting the government's argument that Congress' failure to provide a definition of "nonviolent offense" in the statute gives the Bureau of Prisons complete discretion); Freeman v. Nat'l Broad. Co., 80 F.3d 78, 83 (2d Cir. 1996) (declining to apply *Chevron* deference to a Department of Labor interpretation because "[u]nlike regulations, interpretations [that are not promulgated pursuant to the Administrative Procedure Act] are not binding and do not have the force of law") (citation omitted); Atchison, Topelka & Santa Fe Ry. Co. v. Peña, 44 F.3d 437, 442 (7th Cir. 1994) (noting that the notice and comment process is what affords administrative rules *Chevron* deference), aff'd on other grounds sub nom. Bhd. of Locomotive Eng'rs v. Atchison, Topelka & Santa Fe R.R. Co., 516 U.S. 152 (1996); Kelley v. E.I. DuPont de Nemours & Co., 17 F.3d 836, 841 (6th Cir. 1994) (finding that *Chevron* deference is not applicable to "an agency's policy statements and interpretive rulings, which, unlike agency regulations, are not published for comment and do not have to endure other rule-making formalities"); Doe v. Reivitz, 830 F.2d 1441, 1445-47 (7th Cir. 1987) (refusing to apply *Chevron* deference because the documents at issue were interpretive rather than legislative and thus "are not entitled to the same degree of deference commanded by the high-powered regulations reviewed in *Chevron*").

239. See Nagy, supra note 237, at 974. Circuits applying an expansive reading of *Chevron* to SEC Interpretive Releases include: United States v. LaBonte, 70 F.3d 1396, 1404 (1st Cir. 1995) ("*Chevron* deference is the proper criterion for determining whether a guideline (or, for that matter, commentary that suggests how a guideline should be read) contravenes a statute."); rev'd and remanded by, 520 U.S. 751, 762 n.6 (1997) (finding the statute at issue unambiguous, and therefore, unnecessary to determine whether the commission was owed deference); Warren v. N.C. Dep't of Human Res., 65 F.3d 385, 391 (4th Cir. 1995) (affording *Chevron* deference to the United States Department of Agriculture's Administrative Notice although its position had not been formally enacted in the form of a regulation); Johnson City Med. Ctr. v. United States, 999 F.2d 973, 975-76 (6th Cir. 1993) (giving "some deference" to an IRS revenue ruling); Wagner Seed Co. v. Bush, 946 F.2d 918, 922 (D.C. Cir. 1991) ("[It] simply is not the law of this circuit that an interpretive regulation does not receive the *Chevron* deference accorded a legislative regulation.").
In the instant case, the SEC issued its interpretive release concerning mini-tender offers without proceeding through the formal notice and comment process; therefore, the amount of deference a court might afford it is likely to be inconsistent throughout the circuits. Because the Supreme Court has not definitively weighed in on the applicability of *Chevron* to interpretive releases issued by administrative agencies and the circuits have taken inconsistent positions, there is enormous potential for inconsistent rulings concerning what constitutes fraudulent and manipulative activities under the Williams Act. Material information under § 14(e) must be uniformly defined throughout the United States jurisdictions so that investors are treated equally. It is time to act preventively, rather than wait for the courts to disagree about what information amounts to material information. Failure to do so will result in substantial losses to investors and target companies through the fraudulent practices of manipulative "businesspersons." The SEC must rectify the problems associated with mini-tender offers in a manner that will provide a concrete method of determining when a mini-tender offer violates § 14(e).

C. Despite the SEC’s Actions, Mini-Tender Offers Continue to Be Consummated

Even in the face of lawsuits against those making fraudulent mini-tender offers and an SEC Interpretive Release, mini-tender offers continue to permeate the business world. The continuing presence of mini-tender offers provides concrete evidence that the SEC has not taken sufficient steps to halt the fraudulent and deceptive practices of these "businesspersons."

The same day the SEC’s interpretive release took effect, TRC Capital Corp. ("TRC") extended a mini-tender offer to NOVA Chemical Corp.'s ("NOVA") shareholders. TRC offered to purchase up to 3.3 million shares, or about 3.75%, of NOVA at a price of approximately 5% below the market value. NOVA responded to the mini-tender offer by saying "'shareholder beware'" and did not recommend or endorse the offer in any way. A NOVA spokesperson suggested that the mini-tender offer was "'a win-win situation for [TRC], but lose-lose for the..."
TRC stated, however, that it did not intend to take advantage of shareholders, but that "'[t]he offer [was] designed to appeal to investors who are holding odd lots in NOVA.'" 245 In other words, TRC suggested that shareholders may in fact receive more money for their shares if they tender to TRC because they will not incur high fees and costs that may be associated with selling odd lots of shares if sold individually. 246 On November 17, 2000 TRC made another mini-tender offer to Maytag for up to 2.75 million shares, approximately 3.4% of the total equity. 247 The day prior to the mini-tender offer, the market reflected a value of 11.7% more than the price offered by TRC in the mini-tender offer. 248

The two mini-tender offers by TRC clearly illustrate that the SEC's prior legal proceedings and interpretive release are insufficient to end the deceptive practices of unscrupulous "businesspersons." The SEC must take concrete steps to stop the making of mini-tender offers and the deceptive practices associated therewith.

V. PROPOSED SOLUTIONS

The SEC's lawsuits against IG Holdings, Peachtree Partners, and City Investment Group and its interpretive release are all steps in the right direction. These actions are inadequate, however, to stop the fraudulent practices related to mini-tender offers. Furthermore, only some courts afford the SEC's interpretive releases deference. 249 The failure of the SEC to issue controlling authority will only result in an enormous amount of litigation leading to inconsistent circuit rulings and a needless waste of money. The time is ripe for the SEC to issue new regulations concerning mini-tender offers.

The exponential increase in mini-tender offers in the past few years is cause for substantial concern. As discussed above, mini-tender offers present a myriad of problems that the Williams Act does not address. This Note proposes two solutions, which would work most effectively if used in conjunction with one another, rather than individually.

The first solution suggests that the SEC should enforce § 14(e) of the Exchange Act more stringently by issuing a new regulation.

244. *Id.* (quoting a NOVA Chemical Corp. spokesman).
245. *Id.* (quoting TRC Capital Corp. president Lome H. Albaum).
246. *See id.*
248. *See id.*
249. *See discussion supra Part IV.B.*
Congress intentionally designed the antifraud provision to have a broad-sweeping effect over the securities industry. To carry out its objectives under this section, Congress explicitly authorized the SEC to promulgate and enforce those rules that are necessary. Specifically, the SEC should enact a regulation that (1) makes the failure to disclose the mini-tender offer price and the market price in the mini-tender offer fraudulent per se, and (2) makes the failure to afford a shareholder withdrawal rights fraudulent per se. Arguments against such a solution are easily eliminated. For example, some may argue that this solution is not practical in that daily fluctuations of the market price prevent a mini-tender offeror from specifying the exact market price, or that the market price of a thinly traded security is difficult to establish. These "problems" are hardly insurmountable, as discussed below.

The second solution focuses on the investment banks rather than the mini-tender offeror. Investment banks have a fiduciary duty to disclose information to their clients concerning their portfolios. In accord with their fiduciary duties to their customers, this solution proposes a new regulation that requires investment banks to carefully scrutinize the mini-tender offer and make the shareholders aware of information that is reasonably suspect. Ideally, this would include information such as a discounted mini-tender offer. Arguably, this solution is somewhat problematic in that its focus is not on the troublemaker; but, as addressed below, this too is disposed of easily.

A. Section 14(e) of the Exchange Act Requires Stricter Enforcement via a New Regulation

This solution suggests that the SEC issue a regulation to enforce § 14(e) of the Exchange Act, the antifraud provision, more stringently to cover substantive acts of fraud. While it may not appear that the acts of IG Holdings and companies acting in similar capacities are facially fraudulent, deceptive, or misleading, they clearly are, upon thorough examination.

Congress enacted § 14(e) to alleviate the chicanery involved in making tender offers. This antifraud provision specifically prohibits a tender offeror from engaging in fraudulent, deceptive, or manipulative

250. See discussion supra Part II.B.
252. See RESTATEMENT (SECOND) OF AGENCY § 381 (1958); see also Conway v. Icahn & Co., Inc., 16 F.3d 504, 510 (2d Cir. 1994); 11 N.Y. JUR. 2D Brokers § 45 (1981).
253. See discussion supra Part II.B.2.
acts regardless of the percentage of shares sought or obtained.\textsuperscript{254} It also prohibits the tender offeror from omitting material facts that would make statements misleading.\textsuperscript{255} Furthermore, Congress empowered the SEC to prescribe rules necessary to carry out its intentions under this section.\textsuperscript{256} In its interpretive release, the SEC listed several activities that it deemed fraudulent pursuant to § 14(e).\textsuperscript{257} But, as discussed earlier, courts do not necessarily afford interpretive releases controlling deference. Adopting a regulation, which must be afforded controlling deference under \textit{Chevron}, that explicitly illustrates fraudulent activity under § 14(e), therefore, may best rectify the problems associated with mini-tender offers.

The SEC could effectively curtail mini-tender offers if it incorporated the following suggestions into a new regulation. The market price of a company’s shares is clearly a material fact necessary to make the statements of the mini-tender offeror not misleading because a reasonable investor would consider it to be important in determining whether to tender.\textsuperscript{258} The intentional failure to state the market price is also a fraudulent practice because no one would tender his or her shares for less money than he or she could receive somewhere else.\textsuperscript{259} The predominant factor a shareholder weighs in deciding whether to tender his or her shares is the offering price. If the price is high enough to satisfy the shareholder’s desire, then the shareholder will tender his or her shares. But if the mini-tender offer does not state the market price, the shareholder may not know that the offering price is inequitable.\textsuperscript{260}

When a shareholder receives a mini-tender offer, a logical and reasonable assumption is that the offering price is at a premium to the market price.\textsuperscript{261} Premiums are frequently associated with a tender offer because they provide a shareholder with an incentive to become involved in matters of corporate concern.\textsuperscript{262} Otherwise, a shareholder who generally owns such a small percentage of the company, recognizes

\begin{itemize}
\item \textsuperscript{254} See 15 U.S.C. § 78n(e).
\item \textsuperscript{255} See id.
\item \textsuperscript{256} See id.
\item \textsuperscript{257} See Interpretive Release, \textit{supra} note 7.
\item \textsuperscript{258} See id. at 2248; IG Holdings Order, \textit{supra} note 191, at 833.
\item \textsuperscript{259} See Interpretive Release, \textit{supra} note 7, at 2248. That is, assuming all other aspects being equal. See id. at 2249 (inferring that any offer made below market value is based on unusual facts).
\item \textsuperscript{260} See id. at 2248.
\item \textsuperscript{261} See \textit{Wellman v. Dickinson}, 475 F. Supp. 783, 824. (S.D.N.Y. 1979), aff’d, 682 F.2d 355 (2d Cir. 1982); Interpretive Release, \textit{supra} note 7, at 2248.
\item \textsuperscript{262} See \textit{KLEw & RAMSEYER}, \textit{supra} note 4, at 484 (explaining that when shareholders have a small stake in a corporation, they often have no economic incentive to become well-informed about corporate disputes).
\end{itemize}
that his or her vote has little, if any, significance. The premium offered in a tender offer provides shareholders with such an incentive to become active and tender their shares.

Requiring the mini-tender offeror to disclose the market price would eliminate many, if not all, of the problems associated with mini-tender offers. If the mini-tender offer is distributed to the shareholders with the offering price and the market price, the shareholder will be able to determine if the offer is a good value. The shareholder can then make an informed decision while having all of the material facts concerning the offer. The predominant argument concerning mini-tender offers is that they are misleading; specifically, that they offer to buy a person’s shares for below the market price. Mandating market price disclosure in conjunction with the offering price clearly eliminates this problem.

Moreover, a regulation concerning § 14(e) should make the failure to provide withdrawal rights a violation of § 14(e) fraudulent per se. § 14(d)(5), as supplemented by SEC Rule 14d-7, affords shareholders the right to change their minds after deciding to tender their shares so long as the offer remains open. However, as discussed earlier, § 14(d) only applies to tender offers that acquire more than 5% of a target company’s shares. There appears to be no plausible reason why a shareholder should not be afforded this same withdrawal right when the tender offer is a mini-tender offer. Affording this withdrawal right to shareholders will prevent shareholder exploitation, provided they learn that the mini-tender offer is fraudulent before it closes.

Arguably, this solution is not unassailable; however, none of the problems are fatal. First, some may argue that market prices are readily accessible from numerous sources, and therefore, the shareholder has no right to complain of exploitation if he or she did not investigate the offer. For example, many national newspapers list stock prices on a daily basis, and they are available almost instantaneously on the Internet.

263. See id.
264. This Note recognizes that there are other factors that must be taken into consideration in determining whether an offer is a good value. See Interpretive Release, supra note 7, at 2249 (recognizing that other factors may exist that will cause an offer price to vary from a stock’s market value). For simplicity purposes, this Note will assume that all of these other factors are reflected in the market price.
265. See 15 U.S.C. § 78n(d)(5) (1994); 17 C.F.R. § 240.14d-7 (2000) (defining the time period a shareholder may withdraw his or her tender as equal to the duration of the tender offer).
267. See, e.g., Martinez, supra note 5 (describing how one shareholder who received a lowball tender offer simply called his broker to see if he knew any reason why the shareholder should sell).
These arguments amount to the well-known principle of "caveat emptor." In other words, investors have the means to access the market price of their stocks at their fingertips, and therefore, we need not be concerned with those who do not investigate their offers.

While the principle of caveat emptor may appear to be a viable argument, it can be disposed of easily. The primary goal in enacting the Exchange Act and its subsequent amendments, including the Williams Act, was full and fair disclosure. The Supreme Court has interpreted Congress' intent as "substitut[ing] a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry." Therefore, the concept of full disclosure trumps any theory of caveat emptor.

Second, some may argue that the market price fluctuates too frequently for the offeror to state an accurate market price on the mini-tender offer. A variation of the proposed solution may, therefore, work more effectively. For example, instead of stating the market price, the SEC should require the mini-tender offeror to give the last closing price or perhaps a fifteen-day high and low quote. In disclosing a price range such as this, the shareholder can determine if the offering price is a fair value that he or she is willing to accept. Although no single market price is given, the shareholder will have reasonable information to determine whether the offering price is in the desired price range.

A third potential argument against the proposed solution is that it is impossible to state an accurate market price for a thinly traded security. The first proposed solution mitigates the effects of this problem substantially. If a security is not heavily traded and there is no true market for it, similar to the solution for the fluctuating market problem, the bidder should disclose the last buy and sell bids on the stock or state its last sale price.

While this solution places more responsibility on the mini-tender offeror, it does not counter Congress' intent of full and fair disclosure. However, understanding that shareholders must assume some responsibility for their investments, the SEC can only mandate that mini-tender offerors comply with the full and fair disclosure principle to the extent that it is reasonable. In other words, if the market is thin for a
specific security, the shareholder must assume some responsibility for investigating a mini-tender offer to determine if it is acceptable. Nevertheless, the mini-tender offer should still include the last buy and sell price to determine if it is an acceptable offer for him or her.

Section 14(e) is a broad anti-fraud provision. The SEC should use the provision to its fullest capacities and stop the fraudulent, deceptive, and misleading practices associated with mini-tender offers by adopting this proposed solution.

B. Brokerage Firms Should Scrutinize the Mini-Tender Offer for Reasonably Suspect Information

Brokerage firms owe their clients a fiduciary duty to act in their clients' best interests. As part of this fiduciary duty, this solution suggests that the SEC promulgate a new regulation that imposes a duty on the brokerage firms to scrutinize a mini-tender offer for reasonably suspect information. As discussed earlier, the SEC in its interpretive release, set forth the information it believes is pertinent in determining whether the bidder is acting fraudulently in terms of §14(e) of the Exchange Act.

Simply stated, a broker's fiduciary duty should mandate him or her to examine mini-tender offers pertaining to his or her customers' portfolios for the foregoing information. While this solution tends to remove the focus from the troublemaker and shifts it to a third party, it does not appear to be unreasonable. Fiduciary duties are part of a longstanding legal notion in corporate law. Moreover, the costs associated with this solution are minimal. In fact, there really are no substantial additional costs because the stockbroker already has a fiduciary duty to his or her clients to act in their best interests.

This solution simply requires the broker to make his or her client aware of any reasonably suspect information, something he or she should be doing already as a fiduciary.

Shareholders use brokerage houses in many cases because they lack sophistication in trading securities. In other words, many investors do


273. See, e.g., 36A C.J.S. Ferries § 3 (1961) ("The term [fiduciary] is derived from the civil, or Roman, law . . . [and t]he term 'fiduciary relation' has reference to any relationship of blood, business, friendship, or association in which the parties repose special trust and confidence in each other . . . .")

274. See Conway, 16 F.3d at 510; RESTATEMENT (SECOND) AGENCY § 381.
not know what they should be looking for when they receive information regarding their beneficial ownership. Therefore, this solution suggests that the brokerage firm be current on the information available to its clients and warn them of potentially false, deceptive, and misleading information.

C. Conclusion

The Stock Market Crash of 1929 prompted Congress to enact the Securities Act of 1933. One year later, realizing the need to promote full and fair disclosure in transactions involving the trading of securities, Congress passed the Securities Exchange Act of 1934. Approximately thirty-five years later, Senator Williams introduced a bill that was designed to close a significant gap in investor protection. Congress enacted the Williams Act in 1968, which added several sections to the Exchange Act that focused on the regulation of cash tender offers.

Today, a gap remains in the federal securities laws that the SEC, using the authority delegated to it by Congress, must rectify before companies throughout the country are irreparably damaged and hundreds of thousands of shareholders are further defrauded. There is only one reason why a mini-tender offeror would fail to include the market price (or a market price range) in the mini-tender offer and not afford shareholders withdrawal rights: to mislead investors into believing that the offer is a good value that they should accept.

The proposed solutions, new regulations to enforce § 14(e) more strictly and imposing a fiduciary duty on the investment banks to scrutinize mini-tender offers for reasonably suspect information, close the gap left open by the Williams Act. The costs associated with these solutions are minimal. For example, a mini-tender offeror only needs to place one additional sentence into the offer, stating the market price and offering price. Moreover, none of the costs associated with implementing the proposed solutions place a further burden on the SEC because the mini-tender offeror is still not required to file a tender offer statement. Once the offerors realize that the offering price must be

275. Investors who do not use brokerage firms can reasonably be assumed to possess the required sophistication necessary to ascertain whether the information in a mini-tender offer is reasonably suspect.

276. Obviously, if an investor does not use an investment bank to assist him or her in trading his or her securities, this solution is not applicable.

277. See Soderquist & Gabaldon, supra note 10, at 125.


disclosed, discounted mini-tender offers will likely disappear as a trading transaction.

The SEC must act now. Congress intended full and fair disclosure in passing the Williams Act, and omitting the market price from a mini-tender offer runs contrary to this intention. The potential for irreparable damage is enormous and without proactive action by the SEC, this problem will continue.

Russell L. Hirschhorn*

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## APPENDIX

### Table 1

**A RANDOM SAMPLE OF MINI-TENDER OFFERS**

<table>
<thead>
<tr>
<th>COMPANY</th>
<th>MINI-TENDER OFFER ($)</th>
<th>MARKET PRICE ($)</th>
<th>DISCOUNT RATE (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>WD-40 Co. '</td>
<td>23.50</td>
<td>27.19</td>
<td>14</td>
</tr>
<tr>
<td>GATX Corp. †</td>
<td>32.00</td>
<td>37.44</td>
<td>15</td>
</tr>
<tr>
<td>JDA Software †</td>
<td>7.00</td>
<td>8.63</td>
<td>19</td>
</tr>
<tr>
<td>Florida E. Coast Indus. †</td>
<td>30.00</td>
<td>35.13</td>
<td>15</td>
</tr>
<tr>
<td>New Plan Excel Realty Trust †</td>
<td>19.13</td>
<td>23.00</td>
<td>17</td>
</tr>
<tr>
<td>Lexington Corp. Props. †</td>
<td>10.00</td>
<td>12.00</td>
<td>17</td>
</tr>
<tr>
<td>Inco Ltd. ‡</td>
<td>—</td>
<td>—</td>
<td>17.3</td>
</tr>
<tr>
<td>Asarco ‡</td>
<td>—</td>
<td>—</td>
<td>26</td>
</tr>
<tr>
<td>Cambior Inc. ‡</td>
<td>—</td>
<td>—</td>
<td>20</td>
</tr>
<tr>
<td>Friendly's Ice Cream Corp. ‡</td>
<td>4.00*</td>
<td>6.00 ‡</td>
<td>33</td>
</tr>
<tr>
<td>Spiegel Inc. †</td>
<td>2.63 *</td>
<td>1.78</td>
<td>47</td>
</tr>
</tbody>
</table>

[—] Indicates figures not available
[*] Indicates approximate figures

†. See Martinez, supra note 5.


††. See Telephone Interview with Debbie Burns, supra note 176.
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