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CONTROLLING IMPRUDENT LOCK-UPS: THE NECESSITY FOR FEDERAL LEGISLATION

Target companies often employ the lock-up as a defensive tactic to combat hostile tender offers or takeover bids.[1] A lock-up is an arrangement between the target company (the "target") and a friendly suitor (the "white knight") that gives the latter a decided advantage in bidding for the target.[2]

In a lock-up, a white knight purchases or receives an option to purchase either a principal asset of the target (an asset lock-up)[3] or a specified amount of the target's treasury or authorized but unissued stock (a stock lock-up).[4] Both types of lock-ups serve a three-fold purpose. First, they tempt a white knight to enter into an amicable[5] and reason-

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1. *See* Note, *Swallowing the Key to Lock-up Options,* 14 U. TOL. L. REV. 1055, 1056 n.9 (1983). For a list of defensive tactics and common vocabulary associated with tender offers and defenses, see L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 569-71 (1983); *see also* F. ARANOW & H. EINHORN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 193-202 (1977).

For law review articles discussing lock-ups, see Fleischer & Sternberg, *Corporate Acquisitions,* 12 REV. SEC. REG. (S & P) 937 (1979); Fraidin & Franco, *Lock-Up Arrangements,* 14 REV. SEC. REG. (S & P) 821 (1981); Nathan, *Lock-Ups and Leg-Ups: The Search for Security in the Acquisition Market Place,* THIRTEENTH ANN. INST. ON SEC. REG. 13 (1981); Note, *Tender Offer Defensive Tactics and the Business Judgment Rule,* 58 N.Y.U. L. REV. 621 (1983).

2. 1 A. FLEISCHER, JR., TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING 326 (1983). One commentator contends that the word "lock-up" is a misnomer because the defensive tactic does not actually lock-up a deal. He asserts that a more appropriate name is a "leg-up" because lock-ups "do not preclude competition, but only deter it." Nathan, *supra* note 1, at 18.

3. The principal asset of a corporation is commonly known as the crown jewel. *See* Note, *Developments in Corporate Takeover Techniques: Creeping Tender Offers, Lock-up Arrangements, and Standstill Agreements,* 39 WASH. & LEE L. REV. 1095, 1108 (1982). An asset lock-up is particularly effective because the hostile bidder usually expects to make use of and profit from the asset. Locking up the crown jewels usually eliminates the hostile party's motive for acquiring the target. A tender offer aggressor is not interested in ultimately receiving monetary compensation for the sale of the asset regardless of the price paid for the asset. *Id.* at 1108 n.81; *see also* Note, *supra* note 4, at 1069.

4. The stock price typically is fixed lower than the prices likely to be offered by competing bidders once the bidding heats up. *See* Note, *Lock-Up Options: Toward a State Law Standard,* 96 HARV. L. REV. 1068 (1983). The stock lock-up dilutes the percentage of shares held by a hostile tender offeror and places target shares with a party that will not tender its shares to the hostile party. Lock-ups give to the white knight a competitive advantage and increase the cost and difficulty to hostile suitors of obtaining the requisite shares for control. A substantial stock lock-up thus may deter potential hostile competitors and avoid a bidding war. *See* Freund & Volk, *Developments on Offense,* ELEVENTH ANN. INST. ON SEC. REG. 13, 27-28 (1979); *see generally* A. FLEISCHER, *supra* note 2, at 223-28, 230-32.

5. *See* Note, *supra* note 4, at 1108 n.79.

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ably certain merger.[6] Second, lock-ups permit the target to use discretion in selecting a merger partner and also obtain a premium for its stock or principal asset.[7] Third, and most importantly, they deter hostile tender offerors from attempting to acquire the target by making the target an unattractive acquisition for anyone other than the white knight.[8]

Unsuccessful tender offerors recently began to challenge the legality of lock-ups, asserting that lock-ups constitute a manipulative practice in violation of section 14(e) of the Williams Act (the "Act").[9] These challenges have raised three statutory issues: What constitutes a manipulative practice under the Williams Act? What is the purpose of the Williams Act? Does the Williams Act regulate defensive tactics directly or does it only require full and fair disclosure?

The Second and Sixth Circuits have suggested conflicting answers to these questions.[10] This Note examines the split between these circuits[11] and concludes that in *Buffalo Forge Co. v. Ogden Corp.*,[12] the Second Circuit correctly interpreted the scope of the Williams Act to preclude the Act from regulating disclosed lock-ups.[13]

This Note also suggests that a state law action for breach of fiduciary

6. *See* Note, *Lock-up Enjoined Under 14(e) of the Securities Exchange Act*, 12 SETON HALL L. REV. 881, 882 (1982); *see also* Nathan, *supra* note 1, at 16. *But see* Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757 (2d Cir.) (lock-up did not prevent hostile merger), *cert. denied*, 104 S. Ct. 550 (1983).

7. *See* A. FLEISCHER, supra note 2, at 323.

8. *Id. See supra* notes 3 & 4. *But see* Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757 (2d Cir.) (lock-up failed to prevent hostile suitor from acquiring target), *cert. denied*, 104 S. Ct. 550 (1983).

9. *See* Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757 (2d Cir.), *cert. denied*, 104 S. Ct. 550 (1983); Mobil Corp. v. Marathon Oil Co., 669 F.2d 336 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1490 (1982).

Section 14(e) of the Williams Act, codified at 15 U.S.C. §§ 78n(e) (1982), provides in pertinent part:

> *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.

Id. (emphasis added).

10. *See* Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757 (2d Cir.), *cert. denied*, 104 S. Ct. 550 (1983); Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1490 (1982).

11. *See infra* notes 16-57 and accompanying text.

12. 717 F.2d 757 (2d Cir.), *cert. denied*, 104 S. Ct. 550 (1983); *see infra* notes 43-57 and accompanying text.

13. *See infra* notes 58-71 and accompanying text.

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duty does not provide aggrieved parties with an adequate alternative remedy. These suits are ineffective because the business judgment rule effectively shields target management from inquiries into whether they have breached their fiduciary duty.[14] Finally, after concluding that federal legislation is necessary to provide target shareholders with an effective remedy against self-interested management, this Note proposes specific guidelines to regulate defensive tactics to hostile tender offers.[15]

I. SPLIT IN THE CIRCUITS

A. Mobil Corp. v. Marathon Oil Co.[16]

In October, 1981, Mobil Corporation ("Mobil") made a cash tender offer for a controlling interest in Marathon Oil Company ("Marathon").[17] Marathon directors regarded the tender offer as undesirable and proceeded to search for a more attractive merger with a friendly suitor.[18] After conducting negotiations with several companies, Marathon chose United States Steel Corporation ("U.S. Steel") as its white knight, and entered into a merger agreement containing both stock and asset lock-up provisions.[19] U.S. Steel received an irrevocable stock option to buy ten million authorized but unissued shares of Marathon[20] and an option to purchase Marathon's crown jewel, its interest in the Yates Oil Field.[21] U.S. Steel also made a tender offer for slightly more than

14. *See infra* notes 72-94 and accompanying text.

15. *See infra* notes 95-112 and accompanying text.

16. 669 F.2d 366 (6th Cir. 1981), *cert. denied,* 102 S. Ct. 1490 (1982).

17. *Id.* at 367. Mobil's offer was for 40 million shares at $85 per share. Because Marathon only had 58,685,906 common shares outstanding, a successful Mobil tender offer would have transferred control. *Id.* at 375. Mobil tried to ensure the control transfer by conditioning its tender offer on the purchase of at least 30 million shares. *Id.* at 367. The cash tender offer was only the first step in Mobil's ultimate plan to merge with Marathon. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* The offer was pegged at $90 per share. *Id.*

21. *Id.* The crown jewel option could not be exercised unless U.S. Steel's tender offer failed and a third party took control of Marathon. *Id.* Marathon had almost a one-half interest in Yates Field. Yates Field is "one of the world's most remarkable oil fields." *Id.* (citation omitted). That other potential white knights sought options to buy Marathon's interest in Yates Field indicates the significance of the field. *Id.* at 368.

Although U.S. Steel would have paid $2.8 billion for the Yates Field interest under the option plan, competing tender offerors were primarily interested in the asset itself and not in any monetary compensation. Failure to obtain the Yates Field would deter potential buyers from entering or continuing the bidding. *Id.* at 375. In fact, the court's invalidation of the lock-ups was a condition precedent of Mobil's counter tender offer. *Id.* at 369; *see infra* text accompanying note 24.

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half of Marathon's outstanding shares.[22] U.S. Steel and Marathon fully disclosed the transaction in compliance with federal securities law.[23]

In response to Marathon's arrangement with U.S. Steel, Mobil made a counter tender offer to become effective only if the courts enjoined both the stock and asset lock-ups.[24] Mobil unsuccessfully brought an action to enjoin the lock-ups in the United States District Court for the Northern District of Ohio. The district court determined that the lock-ups in the Marathon-U.S. Steel agreement were not manipulative acts violative of section 14(e) of the Williams Act.[25] The Sixth Circuit, however, reversed and held that both the stock and Yates Field option lock-ups, individually and together, fell within the prohibition against manipulative practices in section 14(e) of the Williams Act.[26]

The Sixth Circuit in *Marathon* recognized that the question whether lock-ups constitute a manipulative practice was a matter of first impression in the courts of appeals.[27] After acknowledging that neither the Securities Exchange Act of 1934 nor the Williams Act defines manipulative acts,[28] the court examined the Supreme Court's consideration of the word "manipulative" in the analogous context of rule 10b-5 actions. Against this background, the court determined that conduct that artificially affects the normal market activity for securities constitutes "manipulative acts or practices."[29]

In applying its definition to the facts in *Marathon*, the Sixth Circuit determined that the Yates Field lock-up severely curtailed the price Mo-

22. The offer was for 30 million shares at $125 per share. *Id.* at 367.

23. The United States District Court for the Northern District of Ohio found that the disclosures met the requirement set forth in section 14(e) of the Williams Act. *Id.* at 370. The Sixth Circuit did not disturb the finding. *Id.* at 369 n.3.

24. The counter offer was for $126 per share. *Id.* at 369.

25. *Id.* at 370.

26. *Id.* at 375. The Sixth Circuit tacitly accepted the district court's finding that both the Marathon and the U.S. Steel tender offer disclosures complied with section 14(e). *Id.* at 370. Furthermore, the Sixth Circuit agreed with the district court that Marathon directors did not breach their state law fiduciary duty to their shareholders. *Id.* at 374.

27. *Id.*

28. *Id.*

29. *Id.* In the analogous context of S.E.C. rule 10b-5, 17 C.F.R. § 240.10b-5 (1983), manipulative refers to practices "that are intended to mislead investors by artificially affecting market activity." Santa Fe Indus. v. Green, 430 U.S. 462, 476 (1977). In Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976), the Court relied on a 10b-5 analysis, stating that "manipulative . . . connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."

bil or any other potential bidder would pay for Marathon[30] and thus established an artificial ceiling on the worth of Marathon's shares.[31] Similarly, the court reasoned that the sheer size of the stock option (the right to purchase one-sixth of Marathon's outstanding shares) combined with its low price gave U.S. Steel an "artificial" or unfair competitive advantage over other tender offerors.[32] The Sixth Circuit concluded that both lock-up options circumvented the "natural forces of market demand," and therefore amounted to manipulative devices.[33]

The Sixth Circuit believed that its definition of manipulative practices under section 14(e) comported with the purpose of the Williams Act.[34] Without examining legislative history,[35] the court asserted that Congress intended to protect target shareholders[36] by providing tender offerors with an "equal opportunity to compete in the market place" for a target company's shares.[37] The Sixth Circuit concluded that a cause of action for manipulation can lie under the Williams Act regardless of whether full disclosure occurs.[38] The court justified this expansion of the scope of the Act by finding that the Supreme Court's opinion in *Santa Fe Industries, Inc. v. Green*[39] does not limit the Act's coverage to nondisclosures.[40]

The *Marathon* court limited its holding by refusing to devise a rule

30. 669 F.2d at 375; *see supra* note 21.

31. 669 F.2d at 375.

32. *Id.* at 375-76. The option was for 10 million shares at $90 per share. First Boston Corporation estimated that the stock option would cost any tender offeror seeking 40 million shares of Marathon approximately 1.1 billion additional dollars to equal the U.S. Steel bid. A dollar increase in the bidding would effectively cost U.S. Steel only $30 million while the cost to Mobil or another bidder would be $47 million. *Id.*

33. *Id.* at 376.

34. *Id.*

35. 669 F.2d at 376; *see also* H. BLOOMENTHAL, 1983 SECURITIES LAW HANDBOOK 330-31 (1983) (discussing the *Marathon* court's failure to examine legislative history).

36. *See infra* text accompanying notes 65-71.

37. 699 F.2d at 376-77.

38. *Id.* at 377.

39. 430 U.S. 462 (1977).

40. 669 F.2d at 376. Discussing section 10(b) of the Securities Exchange Act, in Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977), the Supreme Court stated that the "fundamental purpose 'of the [Securities Exchange] Act . . . [is] a philosophy of full disclosure'; once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute." 430 U.S. at 478. The Supreme Court added that "nondisclosure is usually essential to the success of a manipulative scheme." *Id.* at 477. The *Marathon* court, like other circuit courts, used section 10(b) to construe section 14(e) because of the similarities between the two anti-fraud provisions.

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that would bar all options or lock-ups in a tender offer battle.[41] Several district courts took advantage of the limited holding in *Marathon* and sought to distinguish the stock or asset agreement in the particular fact pattern before them from the lock-up options in *Marathon*.[42]

B. Buffalo Forge Co. v. Ogden Corp.

In *Buffalo Forge Co. v. Ogden Corp.*,[43] the Second Circuit rejected the Sixth Circuit's approach. In January, 1981 the board of directors of the Buffalo Forge Company ("Buffalo Forge") sought to resist an Ampco-Pittsburgh Corporation ("Ampco") tender offer.[44] These efforts resulted in a merger agreement with the Ogden Corporation ("Ogden").[45] Under the merger plan, the Buffalo Forge directors approved a sale of shares of Buffalo Forge treasury stock to Ogden,[46] and granted Ogden a one-year option to buy additional shares at the same price.[47]

Ampco and Ogden engaged in a bidding war out of which Ampco emerged successful.[48] After completing the takeover, Ampco declared

41. *Id.*

42. In Whittaker Corp. v. Edgar, 535 F. Supp. 933 (N.D. Ill. 1982), the court followed *Marathon. Id.* at 949. The judge in *Whittaker,* however, refused to extend the analysis to agreements between a target and white knight for the outright sale of a corporate asset—a subsidiary corporation of the target—through a tender offer scheme. *Id.* The court found that, unlike the Yates Field lock-up in *Marathon,* the outright sale did not interfere artificially with the normal market for the stock. *Id.*

In Marshall Field & Co. v. Icahn, 537 F. Supp. 413 (S.D.N.Y. 1982), the Marshall Field Company (Field) granted BATUS, Inc. two lock-up arrangements that the court determined were not anticompetitive and thus not manipulative devices violating section 14(e) of the Williams Act. *Id.* at 421. The first arrangement gave BATUS the right to purchase Field treasury stock at $25.50 per share. The arrangement excused this purchase if BATUS or a third party obtained 51% of Field or if BATUS kept its tender offer open until April 1, 1983. *Id.* at 420. The second arrangement gave BATUS a right of first refusal on the purchase of Field's Chicago division property only if Field, or any new management in a takeover, sought to sell the property within a year of the termination of the Field-BATUS merger. *Id.* The district court explained that the securities laws should not bar target management from using defensive tactics that are in the shareholders' best interest. *Id.* at 422; *see* Recent Decisions, *Lock-up Options Employed by Target Corporations as a Defensive Technique to Unwanted Takeovers,* 58 NOTRE DAME LAW. 926 (1983) (discussing *Marathon* and *Marshall Field*); *see also* Buffalo Forge Co. v. Ogden Corp., 555 F. Supp. 892 (W.D.N.Y.), *aff'd,* 717 F.2d 757 (2d Cir.), *cert. denied,* 104 S. Ct. 550 (1983).

43. 717 F.2d 757 (2d Cir.), *cert. denied,* 104 S. Ct. 550 (1983).

44. The offer was for $25 per share. *Id.* at 758.

45. *Id.* The merger plan included an even swap of Buffalo Forge stock for Ogden stock, which, at the time, was trading for $32.75. *Id.*

46. *Id.* The plan contemplated the sale of 425,000 shares at $32.75 per share. *Id.* The financing of the Ogden stock purchase consisted of a nine percent note for $13,918,750. *Id.* at 758-59.

47. *Id.* at 758-59. This option was for 143,400 shares. *Id.*

48. *Id.* at 759. Ampco ultimately bid $37.50 per share. *Id.*

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the Ogden agreement null and void,[49] and filed suit for recission of the stock sale and stock option lock-ups. Ampco contended that the agreement violated section 14(e) of the Williams Act, and that it resulted from a breach of fiduciary duty by the old Buffalo Forge board.[50]

The district court held that the Buffalo Forge directors had not breached their fiduciary duty[51] and that the stock arrangements were not manipulative acts under section 14(e).[52] The Second Circuit affirmed and went beyond the district court's fiduciary duty finding to reject the *Marathon* court's interpretation of the Williams Act.[53] The *Buffalo Forge* court maintained that because the Williams Act requires only full and fair disclosure in tender offers, a fully disclosed lock-up does not constitute a misleading, manipulative act.[54]

The Second Circuit argued that the sole purpose of the Williams Act is to provide shareholders with the information needed to respond intelligently to a cash tender offer.[55] The court maintained, therefore, that acts

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49. *Id.* Ampco refused to deliver Ogden's 425,000 shares, tender dividends to Ogden on its stockholdings, or honor Ogden's exercise of its stock option. *Id.*

50. *Id.*

51. *Id.* The district court held that the Buffalo Forge directors opposed the Ampco tender offer and that they had entered the merger agreement with Ogden because Ogden presented the best available offer. According to the court, the directors had not acted out of self-interest. *Id.* (citing Buffalo Forge Co. v. Ogden Corp., 555 F. Supp. 892, 904 (W.D.N.Y.), *aff'd,* 717 F.2d 757 (2d Cir.), *cert. denied,* 104 S. Ct. 550 (1983)).

52. 717 F.2d at 759. The district court sought to distinguish the *Marathon* decision rather than reject it. The court pointed out that the lock-up options in *Marathon* were "intended to, and did, foreclose competitive bidding for control of the corporation." 555 F. Supp. at 906. Neither Buffalo Forge nor Ogden intended to prevent further bidding and the sale of treasury shares did not end the bidding. Thus, the transactions were not manipulative acts. *Id.*

53. 717 F.2d at 760. In addition, the court implied that target directors should have the right to exercise their business judgment in responding to a tender offer when the response is within the bounds of their state law fiduciary duty. *Id.* at 759. The court held that Ampco's cause of action failed because Ogden had fully disclosed the stock purchase and option lock-up and because the Buffalo Forge directors had exercised proper business judgment in granting the lock-ups. *Id.*

54. *Id.* at 760.

55. *Id.* (quoting Piper v. Chris-Craft Indus., 430 U.S. 1, 31 (1977), and Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975)); *see also* H.R. REP. No. 1711, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2813.

The Buffalo Forge court found that Congress wanted the fully informed investor to determine freely which tender offers were "fair and equitable." 717 F.2d at 760 (paraphrasing Edgar v. Mite Corp., 457 U.S. 624, 640 (1982)). The court consequently determined that Congress' prohibition against manipulative devices "was directed only at rigged transactions that might mislead investors in the making of these decisions." 717 F.2d at 760.

The Second Circuit's notion of rigged transactions comes from Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 476-77 (1977). In *Santa Fe,* the Supreme Court contended that "manipulation 'is virtually a term of art when used in connection with securities markets.' . . . The term refers generally to

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are manipulative only if their disclosure misleads shareholders; fully disclosed defensive tactics that effect a stock's market price are not manipulative within the meaning of the Williams Act.[56] The court asserted that Congress did not intend the Williams Act to favor either target management or tender offerors. Thus, according to the court, Congress promoted this neutrality by requiring disclosure rather than by regulating the substantive terms of takeover bids.[57]

II. ANALYSIS OF THE SPLIT

The conflicting conclusions of the Sixth Circuit in *Marathon* and the Second Circuit in *Buffalo Forge* result from differing conceptions of the scope of the Williams Act. In particular, the courts differ over the meaning of "manipulative" in section 14(e).

The Supreme Court in *Ernst & Ernst v. Hochfelder*[58] stated that manipulation under the securities laws "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."[59] In *Santa Fe Industries, Inc. v. Green*,[60] the Court added that manipulation "refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity."[61]

The Sixth Circuit focused on one clause in the Supreme Court's language and defined manipulative acts as conduct artificially affecting market activity.[62] The Sixth Circuit's definition was incomplete, however, because it failed to construe the Court's language in its full context.

In contrast, the Second Circuit applied the Supreme Court's definition

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practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Id.* at 476 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976)); *see* Billard v. Rockwell Int'l Corp., 683 F.2d 51, 56 (2d Cir. 1982). Wash sales, matched orders, and price rigging are fictitious schemes that fraudulently give an investor a false impression about a stock's worth. These schemes differ greatly from lock-up arrangements, which are fully disclosed and result in stock being traded at a sometimes reappraised but not fraudulent value. For definitions of the fictitious manipulation schemes, see Note, *supra* note 3, at 1112 nn.115-17.

56. 717 F.2d at 760.

57. *Id.* ("Congress's concern was more with the procedural provisions of the Act than with the substantive terms of takeover bids.").

58. 425 U.S. 185 (1976).

59. *Id.* at 199.

60. 430 U.S. 462 (1977).

61. *Id.* at 476. *See supra* note 55.

62. *See supra* notes 28-29 and accompanying text; *see also* Note, *supra* note 4, at 1073.

in light of the legislative history. The court noted that Congress intended the prohibition against manipulative practices to prevent management from engaging in "rigged transactions" that could mislead uniformed investors.[63] Thus, under the Second Circuit's definition, fully disclosed stock and asset lock-ups are not manipulative acts under section 14(e).[64]

The Supreme Court's analysis of the Williams Act's legislative history provides further evidence that section 14(e) does not prohibit lock-ups. In *Piper v. Chris-Craft Industries, Inc.*,[65] the Court asserted that the sponsors of the Williams Act "made it clear that the legislation was designed solely to get needed information to the investor."[66] Based on the Supreme Court's analysis of the legislative record, several circuit courts, including the Second Circuit in *Buffalo Forge*, properly regard misrepresentations, including misleading disclosures, as the "essential ingredient" for a cause of action under section 14(e).[67]

The Sixth Circuit in *Marathon* ignored the legislative history when considering the scope of the Act.[68] The Sixth Circuit instead used its own expansive definition of manipulative acts to determine that the Act

63. 717 F.2d at 760. For a discussion of rigged transactions, see *supra* note 55.

64. In both *Marathon* and *Buffalo Forge* the parties made the requisite disclosure, *see supra* notes 16-26 & 47-54 and accompanying text; *see also* Feldbaum v. Avon Prods., Inc., 741 F.2d 234 (8th Cir. 1984) (deception or misrepresentation is essential to a valid section 14(e) claim); Schreiber v. Burlington Northern, Inc., 731 F.2d 163 (3d Cir.) (rejecting *Marathon*'s interpretation of manipulative devices and finding that "the Second Circuit's position, requiring some form of misrepresentation, represents a more accurate view of the Williams Act."), *cert. granted,* 105 S. Ct. 81 (1984); Gearheart Indus., Inc. v. Smith Int'l, Inc., [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,667, at 99,380-81 (5th Cir. Aug. 31, 1984) (manipulation exists only if challengers present evidence showing that target intended to deceive, defraud, or mislead investors through use of a defensive tactic); Dan River Inc. v. Icahn, 701 F.2d 278, 285 (4th Cir. 1983); Panter v. Marshall Field & Co., 646 F.2d 271, 283 (7th Cir.), *cert. denied,* 454 U.S. 1982 (1981).

65. 430 U.S. 1 (1977).

66. *Id.* at 30-31 (assessing a remark made by Senator Williams); *see* 113 CONG. REC. 24, 664 (1967) (statement of Senator Williams). Tender offers often forced shareholders to determine whether it was in their best interest to tender all, some, or none of their shares, without any information about the bidder on which to base their decision. H.R. REP. No. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2812. In response, Congress enacted the Williams Act to force disclosure of the tender offeror's competence, integrity, and future plans. *Id.* Under the Act, Congress mandated full disclosure of circumstances surrounding tender offers. *Id.* at 2813. Shareholders, therefore, would have access to material information permitting them to make intelligent decisions. *Id.*

67. 717 F.2d at 760; *see* Feldbaum v. Avon Prods., Inc., 741 F.2d 234, 237 (8th Cir. 1984); Schreiber v. Burlington Northern, Inc., 731 F.2d 163, 166 (3d Cir.), *cert. granted,* 105 S. Ct. 81 (1984); Atchley v. Qunaar Corp., 704 F.2d 355, 359 (7th Cir. 1983).

68. *See supra* notes 34-40 and accompanying text; *see also* Swanson v. Wabash Inc., 585 F. Supp. 1094 (N.D. Ill. 1984).

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required more than disclosure to shareholders.[69] If the Sixth Circuit had examined the legislative history and its judicial interpretation, it would have concluded that the Williams Act did not prohibit fully disclosed lock-up arrangements between a target company and a white knight.[70] Because investors received full, accurate, and timely disclosure of target company lock-ups in both *Buffalo Forge* and *Marathon*, the lock-ups in both cases should have been lawful under federal securities law.[71]

III. REGULATING LOCK-UPS: STATE LAW FIDUCIARY DUTY AND THE BUSINESS JUDGMENT RULE

Because federal securities laws do not provide a remedy, parties contesting fully disclosed lock-ups must resort to state law fiduciary standards for relief. In *Buffalo Forge*, the court simply limited the Williams Act's coverage to failures to disclosure. It did not condone the use of lock-ups. The Second Circuit stated that courts should not interfere with the business judgment of a target company and intimated that state law governing management's fiduciary duty should regulate the use of lock-ups.[72]

Extending the logic of *Buffalo Forge*, the Second Circuit in *Data Probe Acquisition Corp. v. Datatab, Inc.*[73] held that section 14(e) does not authorize federal courts to judge the substantive legality of lock-ups and other target company responses to takeover bids.[74] The court found that

69. 669 F.2d at 376.

70. The circuit courts addressing the issue since the *Buffalo Forge* decision have unanimously rejected the Sixth Circuit's analysis and followed the Second Circuit's approach. Feldbaum v. Avon Prods., Inc., 741 F.2d 234 (8th Cir. 1984); Gearheart Indus., Inc. v. Smith Int'l, Inc. [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,667, at 99,368 (5th Cir. Aug. 31, 1984); Schreiber v. Burlington Northern, Inc., 731 F.2d 163 (3d Cir.), *cert. granted,* 105 S. Ct. 81 (1984).

71. The *Marathon* decision presents an additional danger if courts interpret it to mean that the Williams Act does not require misrepresentation. This logical extension of *Marathon* would permit federal courts to "supervise the substantive fairness of practically all tender offers." Schreiber v. Burlington Northern, Inc., 731 F.2d 163, 166 (3d Cir.), *cert. granted,* 105 S. Ct. 81 (1984). The resulting federalization of state corporate law by the judiciary, however, runs contrary to the Supreme Court's instructions in Santa Fe Indus. v. Green, 430 U.S. 462 (1977). In *Santa Fe,* the Court stated that "[a]bsent a clear indication of congressional intent, we are reluctant to federalize the substantive portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulations would be overridden." *Id.* at 479; *see* Schreiber v. Burlington Northern, Inc., 731 F.2d 163, 166 (3d Cir.) ("until Congress directs otherwise . . . shareholders like Schreiber must rely on the remedies provided by state law."), *cert. granted,* 105 S. Ct. 81 (1984).

72. 717 F.2d at 759.

73. 722 F.2d 1 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1326 (1984).

74. *Id.* at 4. In response to Data Probe's undesirable tender offer, Datatab, Inc. (Datatab)

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plaintiffs challenging target management defensive tactics are actually alleging corporate mismanagement, which the Supreme Court has refused to treat as actionable under federal law.[75] The court concluded that courts should evaluate the legitimacy of lock-ups under state law fiduciary duty concepts rather than under section 14(e) of the Williams Act.[76]

State law governing a corporate director's fiduciary duty to a corporation and its shareholders creates two separate duties, a duty of care and a duty of loyalty.[77] The duty of care requires a director to exercise the care that a reasonably prudent person would use under similar conditions.[78] The duty of loyalty derives from the traditional prohibitions against self-dealing in corporate transactions.[79] Courts presume, pursuant to the business judgment rule, that directors have satisfied these duties[80] unless the aggrieved shareholder demonstrates that the directors have engaged in self-dealing, fraud, or bad faith.[81] If a plaintiff makes this showing, the burden of proof shifts to the directors to show that the contested transaction was fair and reasonable to the corporation.[82] In the context of corporate takeovers, courts focus primarily on the duty of loyalty. To overcome the business judgment rule and implicate the duty of loyalty, a plaintiff usually must show that self-interest was the director's primary reason for entering a particular transaction.[83]

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entered into a stock lock-up agreement with CRC Acquisition Corp. (CRC). Under the agreement, CRC received a one-year irrevocable option to buy 1,407,674 authorized but unissued shares of Datatab. Datatab thus effectively guaranteed CRC control of Datatab because only 703,836 shares of Datatab common stock were outstanding. Data Probe sought to enjoin the lock-up option under section 14(e) as a prohibited manipulative device, alleging that Datatab management acted for self-serving reasons and thus deprived shareholders of a favorable financial opportunity. *Id.* at 3.

75. *Id.* at 4; *accord* Feldbaum v. Avon Prods., Inc., 741 F.2d 234, 237 (8th Cir. 1984). The *Data Probe* court based its reasoning on the Supreme Court's decision in Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).

In *Santa Fe*, the Court refused to treat acts of corporate mismanagement as manipulative practices in section 10(b) cases in which the real issue was whether management acted in the best interest of shareholders. *Id.* at 477. In reference to manipulative practices under § 10(b), the Court maintained: "[w]e do not think it [Congress] would have chosen this 'term of art' [manipulative] if it had meant to bring within the scope of § 10(b) instances of corporate mismanagement such as this, in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary." *Id.*

76. 722 F.2d at 4; *see* Note, *supra* note 1, at 623 & n.12.

77. Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 225, 264 (2d Cir. 1984).

78. *Id.*

79. *Id.*

80. *Id.* Treadway Co. v. Care Corp., 638 F.2d 357, 381-82 (2d Cir. 1980); Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690, 701-02 (2d Cir. 1980).

81. Treadway Co. v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980).

82. *Id.* at 382.

83. Johnson v. Trueblood, 629 F.2d 287, 292-93 (3d Cir. 1980). Some judges have argued that

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Judicial application of these principles to corporate takeovers has failed to regulate the substance of the merger transaction or the lock-ups used to effect the merger. Courts have found, either as a matter of law[84] or as a matter of fact,[85] that plaintiffs have failed to establish self-interest as the "primary motivating factor"[86] and thus have not overcome the presumption that directors have fulfilled their duty. These cases indicate that very few plaintiffs will be able to sustain their burden of proof.[87]

Even if a plaintiff is able to rebut the presumption of loyalty, the directors only need to show that their approval or disapproval of a merger or lock-up transaction had a valid business purpose.[88] Although the real purpose of the directors' decision may have been to preserve their jobs, proof of a valid business purpose for a transaction will satisfy the courts.[89] Whether directors have breached their fiduciary duty does not depend upon whether the transaction was in the shareholders' best interest.[90] Directors thus must meet a relatively easy burden to vindicate their actions.[91]

Courts, therefore, should reach the reasonableness of lock-ups as a matter of law. In corporate takeovers, directors of target corporations are inherently self-interested because they possess a strong desire to retain their jobs.[92] Courts should not strictly apply the business judgment

courts should lower the standard to shift the burden of proof upon a showing that self-interest was merely a motivating factor in the directors' action. *See* Panter v. Marshall Field & Co., 646 F.2d 271, 304 (7th Cir. 1981) (Cudahy, J., concurring and dissenting); Johnson v. Trueblood, 629 F.2d 287, 299-301 (3d Cir. 1980) (Rosenn, J., concurring and dissenting). Courts, however, have rejected a lower standard. *See* Panter v. Marshall Field & Co., 646 F.2d 271, 294 (7th Cir. 1981); Johnson v. Trueblood, 629 F.2d 287, 292-93 (3d Cir. 1980).

84. Johnson v. Trueblood, 629 F.2d 287, 301 (3d Cir. 1980) (Rosenn, J., concurring and dissenting).

85. Treadway Co. v. Care Corp., 638 F.2d 357, 381-82 (2d Cir. 1980).

86. *See supra* note 83 and accompanying text.

87. *See* Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690 (2d Cir. 1980); cases cited *supra* notes 84-85. A plaintiff has prevailed in one case. Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255 (2d Cir. 1984). The court, however, failed to mention which of the two standards governed its finding. *Id.* at 264-65.

88. Treadway Co. v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980).

89. *Id.*

90. *Id.*

91. *Id.*

92. *See* Bebchuk, *The Case for Facilitating Competing Tender Offers,* 95 HARV. L. REV. 1028, 1054-55 (1982); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer,* 94 HARV. L. REV. 1161, 1175 (1981); Gelfond & Sebastian, *Reevaluating the Duties of Target Management in a Hostile Tender Offer,* 60 B.U.L. REV. 403, 419-20 (1980); Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers,* 33 STAN. L. REV. 819, 825 (1981).

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rule in these situations. Rather, they should move directly to an examination of the fairness and reasonableness of the lock-up.

The current application of the business judgment rule provides directors with excessive protection by creating a presumption too difficult for plaintiffs to rebut[93] and by making the directors' burden of proof too easy to fulfill.[94]

IV. PROPOSED SOLUTION: NEW FEDERAL LEGISLATION

The lack of effective federal and state regulation provides a compelling reason for Congress to enact new federal legislation regulating defensive tactics.[95] While federal law primarily regulates tender offerors, inadequate state law controls management's use of defensive tactics.[96] New federal legislation must fill this gap in the law.[97]

Defensive tactics affect a class of persons that transcends state boundaries. Although corporations are creations of an individual state, problems stemming from defensive tactics are national in scope. Both Congress and the SEC acknowledge that federal controls would provide stable and consistent protection for shareholders against self-serving management.[98]

Two separate legislative proposals would meet these concerns: one

93. *See supra* notes 80-87 and accompanying text.

94. *See supra* notes 88-91 and accompanying text.

95. *See* Comment, *Tender Offers, Lock-Ups, and the Williams Act: A Critical Analysis of* Mobil Corp. v. Marathon Oil Co., 21 DUQ. L. REV. 669, 706 (1983) ("Presently . . . there is no place for fiduciary analysis in federal securities regulation. If there is a need for federalization of this standard of corporate review, it is for Congress to accomplish, not the judiciary under the guise of tortured interpretation . . . .").

In Joseph E. Seagram & Sons, Inc. v. Abrams, 510 F. Supp. 860 (S.D.N.Y. 1981), Judge Polleck clearly stated the problem: "There must be some radical defect or gap in existing securities and corporation law and regulation" if directors of a corporation may "deal with [the corporation's] assets and its life in retaliation for a hostile tender [in a manner] not otherwise intended or defensible as good corporate business." *Id.* at 861 *quoted in* Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 COLUM. L. REV. 249, 316-17 (1983).

96. *See SEC Endorses Major Changes in Merger Fights*, Wall St. J., Mar. 14, 1984, at 4, col. 1.

97. Although many commentators believe that the federal government should refrain from preempting state corporate law, *see* The SEC Today, Aug. 3, 1984, at 1; Wall St. J., Mar. 14, 1984, at 4, col. 1, they nevertheless recognize both the harm that lock-ups pose to shareholders and the difficulties faced in correcting state law. *See* Wall St. J., Mar. 14, 1984, at 4, col. 1.

98. Spurred to action by the SEC's Advisory Panel on Tender Offers, recommendations, and SEC draft legislation, Congress drafted and is considering a tender offer reform bill, H.R. 5693, 98th Cong., 2d Sess. (1984), and a shareholder remedy bill, H.R. 5972, 98th Cong., 2d Sess. (1984). The pending bills attempt to curb target management defensive tactics such as golden parachutes (lucrative change-of-control clauses in management employment contracts) and greenmail (target

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general, directed at all defensive tactics, and one specific, aimed solely at regulating lock-ups. These proposals could function independently or in combination.

A. Regulating Defensive Tactics

Congress should modify the business judgment rule in cases where litigants question directors' responses to hostile tender offers. Under the proposed law, plaintiff shareholders would have to demonstrate that directors' defensive tactics probably would result in retention of management and injury to shareholders.[99] Upon such a showing, the burden should shift to the directors to prove that their tactics would be in the shareholders' best interest.[100] Courts should find that directors have satisfied their burden if they demonstrate that the benefits to the target corporation were greater than the benefits to incumbent management.[101]

This proposal would accomplish two objectives. First, it implicitly recognizes that directors have an inherent conflict of interest. The proposed law would address this problem by giving shareholders the ability to bring an effective challenge to directors' defensive tactics and thus to discourage directors from authorizing imprudent defenses. Second, this proposal would provide an immediate remedy for shareholders, who can-

purchases hostile tender offeror's shares at a premium). These bills also seek to provide shareholders with an adequate remedy to challenge directors' tactics by modifying the business judgment rule.

99. *See SEC Legislative Proposals, Proxy Rules Discussed at ABA Section Meeting,* CORPORATE PRACTICE SERIES (BNA) No. 280, at 2 (April 24, 1984) (paraphrasing John J. Huber, director of the SEC's Division of Corporate Finance). When no hostile tender offer is pending, defensive tactics instituted by management would be exempt from this proposal. *Id.*

Shareholders could prove injury by showing that they have suffered an economic loss or were deprived of an economic gain as result of the defensive maneuver.

100. *Id.*

101. *Id.* For example, assume that the management of company X uses outdated and inefficient management techniques and has failed to integrate new technology into its office and manufacturing operations. Company X's officers also receive four months paid vacation a year regardless of how long they have been working for the company. The result is that company X suffers from declining profits in an industry that is witnessing tremendous growth and prosperity.

Now assume that company Y, a propsering company in the same industry as X that is respected for its innovative management, tenders an offer for a controlling amount of X's stock. X's directors declare the tender offer hostile and authorize X to purchase at a premium all of the shares of X that Y possesses in exchange for the cancellation of the tender offer (this defensive tactic is called "greenmail"). A court assessing the challenged use of greenmail would be justified in finding that the defensive tactic was far less beneficial for shareholders of X (who were deprived of tendering their shares at an above the market price, and of ridding company X of ineffective management) than for management (who retained their jobs).

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not afford to wait for any haphazard, uncertain development of protective law in state courts.

Congress is already examining a shareholder remedy bill, H.R. 5972, that would modify the business judgment rule.[102] H.R. 5972 would place the burden on directors to prove that the challenged defensive action was both prudent for the corporation and fair to shareholders. Although H.R. 5972 would rectify the injustice of a strict adherence to the business judgment rule, it unfairly places the entire burden of proof on the directors.

The main objective in modifying the business judgment rule is to make the rule responsive to situations in which "management places their own survival with the best interests of their shareholders."[103] Plaintiffs should, therefore, have the burden of proving that a particular defensive tactic was motivated by managerial self-interest. Under this proposal, shareholders would make such a showing by proving that a defensive transaction probably would result in employment security for incumbent management.[104]

B. Regulating Lock-ups

Congress should require corporations to seek shareholder approval whenever directors resist a hostile takeover attempt by granting a third party an option to buy significant amounts of stock or significant assets of the corporation.[105] The SEC would define "significant" in a manner that would afford shareholders the opportunity to vote on lock-ups that materially affect the corporation, its assets, business, capital structure, and

102. H.R. 5972, 98th Cong., 2d Sess. (1984).

103. N.Y. Times, Aug. 26, 1984, at 8E, col. 1 (quoting securities professor Joel Seligman).

104. *Cf.* Treadway Co. v. Care Corp., 638 F.2d 357 (2d Cir. 1980) (no breach of directors' fiduciary duty; court relied heavily on the failure of a merger agreement with a white knight to provide the majority of target management with job security). Critics of federalizing the business judgment rule stress that such legislation is objectionable because it alters federal-state relationships. CORPORATE PRACTICE SERIES (BNA) No. 302, at 1, col. 2 (Oct. 2, 1984) (comments of Securities and Exchange Commissioner Charles L. Marinaccio); *see generally* CORPORATE PRACTICE SERIES, (BNA), No. 303, at 8, col. 1 (Oct. 9, 1984) (Secretary of the Treasury Donald Regan voiced his concern over pending tender offer legislation because it "would intrude unnecessarily into state law and constitute an unwarranted step toward imposition of substantive federal corporate law").

105. *See* Lowenstein, *supra* note 95. Professor Lowenstein advocates legislation requiring target management to secure shareholder approval of any defensive tactics that cause "structural changes" in the target. *See also* Goldsmith, *Hostile Takeovers Easier to Swallow Than Poison Pills*, Wall St. J., Feb. 11, 1985, at 16, col. 3 (advocating that shareholders should vote on resolutions to institute "shark repellents" to counter hostile tender offers).

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shareholder voting rights.[106]

For directors to have adequate time to complete a shareholder proxy, tender offers must remain open longer than the present twenty-day period. H.R. 5972 would extend the period to sixty days.[107] Management would need the longer period to formulate and negotiate a satisfactory lock-up agreement, to file proxy materials with the SEC and distribute them to shareholders, and to receive the results of shareholder voting on the arrangement. An open offer period for hostile tender offers of three to four months probably would suffice.[108]

This proposal would shift the responsibility for approving lock-ups to those persons whose interest is at stake and eliminate management's conflict of interest. In addition, management could analyze and investigate more carefully responses that would benefit shareholders.[109] Finally,

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106. *See id.* at 255, 317-18.

107. H.R. 5972, 98th Cong., 2d Sess. (1984). Under H.R. 5972, the sixty-day period would not apply to tender offers solicited by the target company if such offers are not in anticipation of another offer for the same class of securities. *Id.* The SEC voiced objections to the proposed increase in the minimum period for tendering stock. H.R. 5693, 98th Cong., 2d Sess. (1984). The SEC contended that the current twenty-day period strikes an adequate balance between providing shareholders with sufficient time to contemplate responses to tender offers and preserving neutrality in tender offer regulation. CORPORATE PRACTICE SERIES (BNA) No. 301, at 7, col. 1 (Sept. 25, 1984). The SEC argued that the proposed lengthening of the "time frame for investors to evaluate tender offers" was unwarranted. *Id.*

In his introduction of H.R. 5972, Senator Timothy Wirth explained the need for extending the minimum offering period:

> It appears that much of the frantic nature of the current takeover process is brought on by the fact that, under current law, a tender offer can be effected in as little as 20 business days. In the view of many experts, many of the abusive defensive tactics used by management are simply efforts to buy time. In testimony before the subcommittee, State securities administrators, academics, and at least one prominent investment banker, Felix Rohatyn, argued that the tender-offer process would operate in a much more considered and rational atmosphere if there were more time provided. Mr. Rohatyn, the State regulators, and others suggested 60 days as the minimum offering period. I have included such a provision in the bill introduced today.

CONG. REC. H7441 (daily ed. June 18, 1984). *See also* Letter from Martin Lipton to Senator Alfonse M. D'Amato and Representative Timothy E. Wirth (Nov. 20, 1984). As part of the proposed Shareholder Protection and Elimination of Takeover Abuses Act of 1985, Martin Lipton advocates that tender offers must be held open for 60 calendar days to reduce the time pressure on boards of directors.

108. Professor Lowenstein proposes that tender offers should remain open for six months. Lowenstein, *supra* note 95, at 317. He suggests, however, that four months would be the bare minimum. *Id.* at 323.

109. *See* Letter from Martin Lipton to Senator Alfonse M. D'Amato and Representative Timothy E. Wirth (Nov. 20, 1984) (discussing proposed Shareholder Protection and Elimination of Takeover Abuses Act of 1985) ("Extension of the tender offer period will give shareholders and boards of directors needed time to evaluate fully the merits of an unsolicited tender offer without

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lessened time constraints and increased competition might attract more potential buyers to the bidding process, thereby bringing a higher price for target company shares.[110]

The proposal, however, raises several problems. Does this democratic solution create inefficiency and economic cost problems for a target company? Will the proposal discourage the unseating of inefficient, subpar management by spreading the impact of the tender offer over four months?[111] Will a longer tender offer result in increased costs for the tender offeror and the target company by creating more time for litigation and maneuvering by both parties?[112] Does the tender offer period unduly favor target management and thus impede the Williams Act's pursuit of neutrality?

Although these concerns are important for Congress to consider, the status quo provides little or no more relief from these problems than the proposed solution. Because shareholders, rather than self-interested directors, should decide the ultimate fate of their corporation and investments, the adverse effect of the proposed legislation would not outweigh the benefits the legislation would bring to the hostile tender offer arena. In addition, enactment of these legislative solutions, either together or separately, ultimately would advance directors to a more responsible plane of responding to shareholders' needs and desires in tender offer situations.

Douglas M. Baron

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being subjected to the kind of intense pressure that now often leave a board with no choice but to act hastily and, in some cases, rashly.").

110. *See generally id.* at 255-56.

111. *See id.* at 324-35.

112. *See id.* at 325-26.

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