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SEC Tender Offer Timing Rules: Upsetting a Congressionally Selected Balance

W. Brewster Lee III

SEC TENDER OFFER TIMING RULES: UPSETTING A CONGRESSIONALLY SELECTED BALANCE

In 1968, Congress passed the Williams Act[1] to protect shareholders of companies subject to tender offers.[2] The Act amended the Securities Exchange Act of 1934 to require bidders to disclose certain information relating to the offer.[3] Congress sought to protect the shareholders primarily through disclosure requirements and took care not to tip the balance of regulation in favor of either the target management or the bidder.[4] To give shareholders time to analyze the bidder's disclosure

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1 Act of July 29, 1968, Pub. L. No. 40-439, 82 Stat. 454 (amending Securities Exchange Act of 1934, §§ 12-14, 15 U.S.C. § 78*l*-78n (1982)).

2 The securities laws and agency regulations fail to define the term "tender offer," although congressional reports accompanying the Williams Act contain a general description. *See* H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2911-12 [hereinafter cited as H.R. REP. NO. 1711]; S. REP. NO. 550, 90th Cong., 1st Sess. 2 (1967) [hereinafter cited as S. REP. NO. 550]. Since 1976, the agency has often considered promulgating a definition but has not adopted one to date. SEC Securities Exchange Act Release No. 15,548 (Feb. 5, 1969), 16 SEC Docket 973 (1978-79) ("[I]n recognition of the dynamic nature of tender offers and the need for the Williams Act to be interpreted flexibly in a manner consistent with its purposes, the Commission affirms its position that a definition of the term 'tender offer' is neither appropriate nor necessary at this time.") [hereinafter cited as SEC Rel. 15,548]; *see also* Fogelson, Wenig & Friedman, *Changing the Takeover Game: The Securities and Exchange Commission's Proposed Amendments to the Williams Act,* 17 HARV. J. ON LEGIS. 408, 426-38 (1980) (discussing 1979 proposed statutory definition of "tender offer") [hereinafter cited as Fogelson].

Congress was concerned that cash tender offers forced shareholders to respond to offers without adequate information. Prior to the Williams Act, the bidder could proceed with his offer without disclosing his identity, financing, or plans for the company if the acquisition proved successful. This secretive atmosphere caused a rush to tender that Congress sought to control through the Williams Act. S. REP. NO. 550, *supra*, at 2-4; H.R. REP. NO. 1711, *supra*, at 2-4; *see also* Edgar v. MITE Corp., 457 U.S. 624, 634 (1982) (Act reflects Congress's desire "to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice").

3 The Williams Act added to the Securities Exchange Act of 1934, § 13(d) and (e), 15 U.S.C. § 78m(d)-(e) (1982), and § 14(d), (e), and (f), 15 U.S.C. § 78n(d)-(f) (1982), to regulate acquisitions of substantial blocks and tender offers of equity securities. Under § 13(d), a person who acquired more than 10% of a class of equity securities of a company had to file Schedule 13D with the agency, the company, and the appropriate exchanges, within 10 days of the acquisition, and had to make prompt amendments. Schedule 13D required information on the party's identity, background, source of funding, share holdings in the target company, relevant agreements, and sometimes, future plans. Section 13(e) regulated issuer tender offers. Section 14(d) required bidders to have an information statement on file with the SEC when commencing its offer. Section 14(d)(4) permitted the agency to regulate solicitations or recommendations made by the management of the target corporation to its shareholders. Section 14(e), an antimanipulative provision, granted the SEC rulemaking authority. *See infra* notes 13, 99-107 and accompanying text.

4 See *infra* notes 79-112 and accompanying text for a discussion of congressional fear of "tipping the balance of regulation" and the effects of delay upon tender offers. Though any

materials, Congress enacted two important substantive[5] timing provisions.

Section 14(d)(5) allows shareholders to withdraw tendered securities during the first seven calendar days of the tender offer period.[6] Section 14(d)(6) requires that when a partial tender offer[7] is oversubscribed during the first ten calendar days, "the securities taken up shall be taken up [by the bidder] pro rata . . . according to the number of securities deposited by each depositor."[8] The withdrawal and pro rata rights thereby effectively established minimum tender offer periods of seven days for an "any and all"[9] tender offer and ten days for a partial tender offer. Congress amended the Williams Act in 1970,[10] broadening its coverage[11] and augmenting the SEC's rulemaking authority under sec-

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regulation at all favors incumbent management, Congress sought to minimize the impact of thc legislation and to avoid undue interference.

5 Congress labeled § 14(d)(5), (d)(6), and (d)(7) "substantive" to distinguish them from those sections governing disclosure. Section 14(d)(7), the "best price" rule, is not relevant to the subject matter of this Note, therefore this Note will refer only to the withdrawal and proration provision as the substantive timing provisions.

6 Securities Exchange Act of 1934, § 14(d)(5), 15 U.S.C. § 78(d)(5) (1982), establishes the withdrawal period. It provides:

> Securities deposited pursuant to a tender offer . . . may be withdrawn by . . . the depositor at any time until the expiration of seven days after the time definitive copies of the offer . . . are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

7 For a general definition of "partial tender offer" see Securities Exchange Act of 1934, § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1982); *infra* note 8.

8 Securities Exchange Act of 1934, § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1982), provides:

> Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copes of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offercd to security holders, as described in paragraph (7), is first published or sent or given to security holders.

9 *See infra* note 112 and accompanying text. In an "any and all" tender offer, a bidder offers to take all of the equity securities of a class. Such an offer was not subject to § 14(d)(6)'s 10-day pro rata rule and therefore was limited only by § 14(d)(5)'s seven-day withdrawal period. On the eighth day the bidder could purchase all the tendered stock.

10 Act of Dec. 22, 1970, Pub. L. No. 91-567, 84 Stat. 1497 (amending Securities Exchange Act of 1934, §§ 13(d)-(e), 14(d)-(e), 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(e) (1982)) [hereinafter cited as *1970 Amendments*].

11 Congress extended the requirements of the Williams Act to include tender offers involving insurance company stock and stock for stock exchange offers. Congress also lowered the percentage of stock holding needed to activate the disclosure requirements from 10% to 5%. *See supra* note 3 (discussion of § 13(d)). This expanded coverage was intended to "provide public disclosure of impending takeovers at a more meaningful level." S. REP. NO. 1125,

tion 14(e)[12] to prevent "fraudulent, deceptive, or manipulative" practices in tender offers.[13]

In 1979, the SEC promulgated rules[14] extending the withdrawal period to fifteen business days,[15] establishing a twenty business day minimum tender offer period,[16] and allowing bidders to voluntarily extend pro rata rights for the full tender offer period.[17] In 1982, the SEC adopted revised rule 14d-8, requiring bidders to accept on a pro rata basis all securities tendered in response to a partial tender offer.[18] The rule expressly contradicts the statutory requirement of section 14(d)(6) that the pro rata acceptance period expire at the end of the tenth day following commencement of the tender offer. Each of these rules raises questions about the SEC's authority to adjust the statutory timing requirements struck by Congress between the target management and the bidder.

This Note analyzes the SEC's authority under the Williams Act to promulgate substantive timing regulations. First, it presents the SEC's

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91st Cong., 2d Sess. 3 (1970) [hereinafter cited as S. REP. NO. 1125]; H.R. REP. NO. 1655, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5025, 5027 [hereinafter cited as H.R. REP. NO. 1655].

12 S. REP. NO. 1125, *supra* note 11, at 2; H.R. REP. NO. 1655, *supra* note 11, at 2.

13 Securities Exchange Act of 1934, § 14(e) provides:

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

15 U.S.C. § 78n(e) (1982) (emphasis added to indicate 1970 addition).

14 SEC Securities Exchange Act Release No. 16,384 (Nov. 29, 1979), 18 SEC Docket 1053 (1979) [hereinafter cited as SEC Rel. 16,384].

15 17 C.F.R. § 240.14d-7 (1983).

16 *Id.* § 240.14e-1.

17 *Id.* § 240.14d-8 [hereinafter cited as old rule 14d-8].

18 SEC Securities Exchange Act Release No. 19,336 (Dec. 28, 1982), 47 Fed. Reg. 57,679 (1982) (to be codified at 17 C.F.R. § 240.14d-8 [hereinafter cited as SEC Rel. 19,336]. This section provides:

> Notwithstanding the pro rata provisions of Section 14(d)(6) of the Act, if any person makes a tender offer or request or invitation for tenders, for less than all of the outstanding equity securities of a class, and if a greater number of securities are deposited pursuant thereto than such person is bound or willing to take up and pay for, the securities taken up and paid for shall be taken up and paid for as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor *during the period such offer, request or invitation remains open.*

SEC Rel. 19,336, at 57,680 (emphasis added); *see also* SEC Securities Exchange Act Release No. 18,761 (May 25, 1982), 47 Fed. Reg. 24,338 (1982) (release proposing revised rule 14d-8) [hereinafter cited as SEC Rel. 18,761]. The rule was adopted over the dissents of SEC Chairman Shad and Commissioner Treadway. SEC Rel. 19,336, *supra,* 47 Fed. Reg. 57,680-81) (1982).

position regarding its authority to promulgate these rules.[19] Second, the Note outlines fundamental aspects of both administrative rulemaking theory and judicial review of administrative regulations.[20] Finally, it examines the legislative history,[21] administrative implementation,[22] and judicial interpretation of the Williams Act.[23] The Note demonstrates that although policy considerations may support these new rules, the SEC lacks the authority to promulgate them, particularly revised rule 14d-8.[24] It proposes that Congress eliminate the uncertainty surrounding the SEC's rulemaking authority either by delegating specific authority to the SEC to repromulgate these rules or by clearly removing the statutory timing provisions from agency control.

I
THE SEC'S POSITION

In 1979, "in response to serious concerns that . . . security holders . . . lacked sufficient time and information to make important investment decisions,"[25] the SEC revised the disclosure statements, extended the withdrawal period to fifteen days, and established a minimum tender offer period of twenty business days.[26] The SEC has since asserted that newly developed practices undermine the effectiveness of the 1979 revisions.[27] In particular, the agency asserts that partial tender offers with ten-day proration periods force shareholders to resolve "inordinately complex investment decisions" hastily.[28] Consequently, in May of 1982, the SEC proposed revised rule 14d-8 to achieve the "goal

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19 *See infra* notes 25-39, 44-45 and accompanying text.

20 *See infra* notes 40-43, 46-77 and accompanying text.

21 *See infra* notes 79-112 and accompanying text. The Note also examines the 1975 Hart-Scott-Rodino Act as it bears on this subject.

22 *See infra* notes 114-45 and accompanying text.

23 *See infra* notes 149-67 and accompanying text.

24 *See infra* notes 168-76 and accompanying text. Commissioner James Treadway likened the agency's uncertain authority to "standing in a quagmire and attempting a slamdunk." *Commission Divided in Decision to Extend Partial Tender Offer Proration Period*, THE SEC TODAY No. 82-241, at 2 (Dec. 16, 1982).

25 SEC Rel. 18,761, *supra* note 18, at 24,338-39.

26 SEC Rel. 16,384, *supra* note 14. The SEC also established an exemption to § 14(d)(6) allowing bidders to voluntarily lengthen the proration period. *See infra* notes 126-30 and accompanying text. In providing this exemption the SEC implicitly took the position that § 14(d)(6) merely established a *minimum* proration period. The legislative history behind the section precludes extension by the SEC. *See infra* notes 78-113 and accompanying text. Congress, however, never addressed the issue of a voluntary exemption. No proration period at all allows a bidder to buy the stock as it is tendered with the result that most bidders would not grant proration rights beyond the required minimum.

27 SEC Rel. 18,761, *supra* note 18, at 24,339.

28 *Id.* The SEC also expressed concern about "the growing use by bidders of 'two-step' offers that combine a partial cash tender offer with an offer of the securities of the bidder, usually in a subsequent . . . merger . . . ." *Id.* The SEC illustrated the complexity of tender offers in the post-1979 revision period by referring to "the three way bidding contest for control of Conoco, Inc. by Joseph E. Seagram & Sons, Inc., E.I. DuPont de Nemours and Mobil

of informed decisionmaking underlying the minimum tender offer period adopted under section 14(e) of the Exchange Act."[29]

When the SEC first published the 1979 rules for comment in 1976, it cited sections 14(e) and 23(a) for authority.[30] Ironically, that proposal contained a caveat against tipping the congressionally determined balance in favor of either the tender offeror or the target management.[31] When the SEC made its final proposal of the 1979 rules, it again paid lip-service to the goal of neutrality.[32]

In May 1982, the SEC, relied primarily on the rulemaking authority contained in section 14(e) in proposing a full-length pro rata rule to ensure the effectiveness of the 1979 timing rules.[33] Despite congressional rejection of the full length pro rata proposal in 1968, "the [SEC] believe[d] that in amending Section 14(e) in 1970 to give the Commission additional rulemaking authority, Congress recognized that the statutory scheme established in 1968 was inadequate to deal with continuously evolving tender offer practices . . . ."[34] The agency also noted that section 23(a), which grants it the "power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title," provided rulemaking authority to adopt the full length pro rata rule.[35]

In a three-to-two decision, the SEC adopted revised rule 14d-8 in December 1982.[36] The majority's only mention of the controversy sur-

Corporation, in which there were nine proration dates and six separate proration pools." *Id.* at 24,339 n.17.

Although multiple proration pools added to the complexity of the shareholder's decision, they were contemplated by Congress during the enactment of the Williams Act. *See* Jacobs v. G. Heileman Brewing Co., 551 F. Supp. 639 (D. Del. 1982). In *Jacobs,* Pabst Brewing Company charged that multiple proration pools of G. Heileman Brewing Company violated § 14(d) and (e) of the Securities Exchange Act of 1934 by "discriminating in favor of those who have tendered [into the first pool]," and cited SEC Rel. 18,761, *supra* note 18, for support. The court held that multiple proration pools do not violate the Williams Act and cited S. REP. NO. 550, *supra* note 2, at 10, and H.R. REP. NO. 1711, *supra* note 2, at 10-11, to support its decision.

For further discussion in favor of the new proration rule, see Green, Nathan & Gelfond, *The SEC Adopts a More Rational Prorationing Rule,* in NEW TECHNIQUES IN ACQUISITIONS & TAKEOVERS 198 (1983). For further discussion in opposition to the new proration rule, see Stephenson, *Partial Tender Offers; "Front-End Loaded" Transactions; Election Procedures in "Cash Election" Mergers*, in NEW TECHNIQUES IN ACQUISITIONS & TAKEOVERS 79, 82-113 (1983).

29 SEC Rel. 18,761, *supra* note 18, at 24,339. The SEC reported that many investors do not receive tender offer material until late in, or after, the 10-day proration period. SEC Rel. 19,336, *supra* note 18, at 57,679.

30 SEC Securities Exchange Act Release No. 12,676 (Aug. 2, 1976), 10 SEC Docket 143 (1976) [hereinafter cited as SEC Rel. 12,676]; *see also infra* notes 118-25 and accompanying text.

31 SEC Rel. 12,676, *supra* note 30, at 145; *see also infra* text accompanying notes 119-20.

32 SEC Rel. 15,548, *supra* note 2, at 974; *see also infra* notes 126-28.

33 SEC Rel. 18,761, *supra* note 18.

34 *Id.* at 24,339.

35 *Id.* at 24,339 n.10; SEC Rel. 19,336, *supra* note 18, at 57,679 n.2.

36 SEC Rel. 19,336, *supra* note 18.

rounding the SEC's authority was in a footnote: "[C]onsider[ing] the comments received regarding its authority to adopt revised rule 14d-8, the [SEC] continues to believe that Sections 14(e) and 23(a) provide such authority."[37] Both dissenting commissioners questioned the SEC authority.[38]

II
ADMINISTRATIVE LAW: RULEMAKING THEORY AND JUDICIAL REVIEW

The validity of revised rule 14d-8 and the extent of the SEC's authority under sections 14(e) and 23(a) to promulgate other substantive timing regulations involve questions of administrative law.[39] A legislature delegates rulemaking authority to an administrative agency in order to implement policies that the legislature cannot feasibly or adequately carry out by statute.[40] This delegation authorizes the

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37 *Id.* at 57,679 n.2. The SEC noted that "41 commentators submitted 42 letters" concerning the proposed full-length proration rule. *Id.* at 57,679 n.1. These letters are on file in the SEC Public Reference Room in file No. 57-993. The comment letters that dealt with the statutory authority for the new rule greatly aided the author of this Note. Of particular assistance were the following: Comment Letter from the American Bar Ass'n, Sec. of Corp., Banking & Bus. Law (July 6, 1982) ("close question"); Comment Letter from the Ass'n of the Bar of the City of New York (July 12, 1982) (SEC lacks authority; rule tips balance in favor of "any and all" offers); Comment Letter from Caplin & Drysdale (July 1, 1982) (policy supports new rule but suggests alternative of making proration period coincide with the 15-day withdrawal period under rule 14d-7; also suspects that SEC lacks authority to adopt the proposed rule); Comment Letter from Simpson, Thatcher & Bartlett (July 2, 1982) (SEC lacks authority to adopt proposed rule; rule will create problems); Comment Letter from Troutman, Sanders, Lockerman & Ashmore (July 2, 1982) (SEC lacks authority).

38 SEC Rel. 19,336, *supra* note 18, at 57,680-81 (Shad, Chairman, dissenting) ("The Commission's legal authority to extend the statutory proration period is not clear."); *id.* (Treadway, Comm'r, dissenting) ("[T]he Commission lacks the authority to adopt the rule.").

39 *Cf.* Canadian Pac. Enters. v. Krouse, 506 F. Supp. 1192 (S.D. Ohio 1981) (reviewing validity of SEC rule 14d-2, 17 C.F.R. § 240.14d-2 (1983), according to standards of Administrative Procedure Act, 5 U.S.C. § 706 (1982)).

40 *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.05 (1958). In explaining the growth of administrative agencies in government, Professor Davis writes:

> A legislative body is at its best in determining the direction of major policy and in checking and supervising administration. It is ill-suited for handling masses of detail, or for applying to shifting and continuing problems the ideas supplied by . . . professional advisers . . . . Gradually our legislative bodies developed the system of legislating only the main outlines of programs requiring constant attention, and leaving to administrative agencies the tasks of working out subsidiary policies.

Id. at 37; *see also* G. ROBINSON, E. GELLHORN & H. BROFF, THE ADMINISTRATIVE PROCESS 11 (2d ed. 1980) [hereinafter cited as ROBINSON]:

> The principal alternative approaches to reliance on an agency have been for Congress to impose requirements directly through legislation (e.g., the minimum wage law), or for it to make only a general statement of policy in legislation and to delegate the working out of detail to the courts (e.g., the Sherman Act). But for a number of reasons these alternatives have often seemed unwise. Congress often prefers not to legislate in detail because of the heavy burdens such an approach would impose on Congress, the need for frequent

agency to act in a manner consistent with broad and frequently vague statutory standards.[41] The nature of the regulated area often requires the flexibility afforded by administrative agency regulation.[42] On the other hand, if a legislature is confident that rigid statutory provisions best serve its purpose, it can limit an agency's discretion through detailed legislation that precludes administrative rulemaking.[43] The tension between these two approaches lies at the heart of the debate over the validity of the SEC's substantive timing regulations.

While Congress has generally delegated broad rulemaking authority[44] to the SEC, its painstaking approach[45] in enacting precise tender offer timing provisions to serve competing aspects of investor protection, namely, disclosure of material information without inhibiting tender offers, suggests that these provisions are not subject to broad revision by the SEC. Moreover, the SEC's reliance upon the grant of additional rulemaking authority in 1970 is unavailing because no grant of rulemaking authority can authorize an agency to adopt rules that contradict the plain terms of Congress's previous legislation.

A court faced with a challenge to an administrative regulation must determine whether the agency acted within its statutory authority in promulgating the rule.[46] As statutory interpretation is clearly within the domain of the court, the breadth of the court's review at this stage

statutory amendments as conditions change, and the frequent presence of technical matters on which Congress is not knowledgeable.

41 In the past, vague statutory guidance to administrative agencies led to some questions concerning the constitutionality of such delegations of authority. This so called "non-delegation doctrine" is now generally considered defunct. *See* K. DAVIS, *supra* note 40, at § 2.01. *But cf.* Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation,* 68 CORNELL L. REV. 1, 7 (1983) (arguing for renewed nondelegation doctrine).

42 *See generally* 1 K. DAVIS, *supra* note 40; ROBINSON, *supra* note 40.

43 *See* Addison v. Holly Hill Fruit Prods., 322 U.S. 607, 616-19 (1944).

44 *See* SEC v. Sloan, 436 U.S. 103 (1978); Touche Ross & Co. v. SEC, 609 F.2d 570, 580 (2d Cir. 1979); Commercial Capital Corp. v. SEC, 360 F.2d 856, 857 (7th Cir. 1966); R.A. Holman & Co. v. SEC, 299 F.2d 132 (D.C. Cir. 1962); *cf.* 3 L. LOSS, SECURITIES REGULATION § 1936 (1961) (suggesting that SEC does not have general power to legislate, but is bound by what is "necessary" within interpretation of specific language of Securities Exchange Act of 1934).

45 *See infra* notes 46-65 and accompanying text; *see also* Securities Exchange Act of 1934, § 14(d)(5), (d)(6), 15 U.S.C. §§ 78n(d)(5), (d)(6) (1982).

46 In his treatise on administrative law, 1 K. DAVIS, *supra* note 40, § 30.14, Professor Davis describes the confusion surrounding the proper scope of judicial review of administrative regulations. He also introduces his theory on the causes for the two divergent approaches to review of administrative regulations: "substituted judgment" and "rational basis."

Arguably, courts are to decide the questions of law, leaving questions of fact, if within the agency's jurisdiction, to the agency to resolve. The Supreme Court and lower courts, however, do not follow such a theoretically sound approach.

Professor Davis suggests certain factors that prompt a court in a given case to deviate from this approach and defer to the agency on questions of law. Three major factors are: (1) the comparative qualification of the court and agency to decide the particular issue; (2) the extent to which the legislative body has committed particular problems to administrative or judicial determination; and (3) the tendency of courts to substitute judgment on broad genershould be very wide.[47] An agency's interpretation of the statute it administers warrants consideration, but this interpretation should not be conclusive.[48] Questions of fact, on the other hand, are within the province of the agency[49] and upon these issues a court normally should not substitute its judgment.[50]

The Supreme Court recently employed this analysis to overturn administrative regulations. In reviewing certain Treasury Regulations in *Rowan Cos. v. United States,*[51] the Court stated: "We consider Treasury Regulations valid if they 'implement the congressional mandate in some

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alizations. The scope of judicial review and the deference given by the court to the administrative determination are also explained by

> the court's attitude toward the agency, the degree of thoroughness and impartiality in the agency's performance, the extent of the court's agreement or disagreement with the administrative determination, the court's interest in and its appraisal of the importance of the subject matter, alternative demands upon time and attention of the judges at the particular time, need or lack of need for judicial bolstering of administrative policy, need for stability of particular law or policy compared with need for continued fluidity, manner of presentation of cases through briefs and oral arguments, and fortuities of writing opinions explaining scope of review in particular cases.

Id. at 269.

47 *Id.* § 30.01-.02.

48 In NLRB v. Hearst Publications, 322 U.S. 111 (1944), the Court reviewed the NLRB's interpretation of the term "employee" to determine the scope of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976). After having found that Congress delegated to the NLRB the authority to interpret the term "employee" in light of their experience in employment relations, the Court said:

> Undoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.

322 U.S. at 130-31.

49 *See generally* 4 K. DAVIS, *supra* note 40, § 30.01-.14.

50 *Id.*

51 452 U.S. 247 (1981). In *Rowan Cos.*, an off-shore drilling company challenged the Treasury's interpretation of "wages" for the purpose of determining tax liability under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA). *See* Treas. Reg. §§ 31.3121(a)-1(f), 31.3306(b)-1(f) (1980). The challenged regulations provided that the value of room and board given to the taxpayer's employees was includable in the computation of "wages"—the base for taxation under FICA and FUTA. *Id.* The Treasury Regulation interpreting the definition of "wages" for the purposes of income tax withholding, however, provided that room and board were not includable in the computation of "wages." *See* Treas. Reg. § 31.3401(a)-1(b)(9) (1980). The taxpayer argued that Congress intended the term "wages" to have the same meaning for purposes of FICA, FUTA, and income tax withholding, 452 U.S. at 251, and that the regulations under FICA and FUTA were invalid. *Id.* at 254.

The Fifth Circuit sustained the validity of the FICA and FUTA regulations, Rowan Cos. v. United States, 624 F.2d 701 (5th Cir. 1980), *rev'd,* 452 U.S. 247 (1981), reasoning that the different interpretations of "wages" were not inconsistent, because "wages" served a different function in different tax acts. 624 F.2d at 706. The Supreme Court reversed the lower courts, holding that Congress had intended the term "wages" to have the same meaning under FICA and FUTA as it had for the purposes of income tax withholding. 452 U.S. at 263. The reasonable manner.' . . . [W]e look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose."[52] The Court noted that where an agency promulgated a regulation under a general rulemaking provision, and where Congress has specifically acted, less deference was due than where the "regulation [is] issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision."[53] The Court considered three other factors before reaching its determination: (1) the regulation's contemporaneousness with the statute; (2) the consistency of the agency's interpretation over time; and (3) subsequent congressional scrutiny of the regulation.[54]

In *United States v. Vogel Fertilizer Co.,*[55] the Court considered the validity of another Treasury Regulation.[56] Having noted that its review was limited to the determination of whether the regulation reasonably implemented the congressional mandate,[57] the court added: "this general principle of deference while fundamental, only 'sets the framework for judicial analysis; it does not displace it.' "[58] The Court discussed the lessened deference due to a rule promulgated under general rulemaking authority,[59] and refused to accept the regulation simply "because it [was] not 'technically inconsistent' with the statutory language."[60] The legislative history guided the Court to the conclusion that the challenged regulation was invalid.[61] Additionally, the Court rejected the Treasury's argument that the statutory framework was inadequate as Congress had specifically determined that framework.[62]

Thus, in determining the extent of an agency's rulemaking power and the validity of a given rule, a court must first compare the language of the rule with that of the statute under which it is promulgated.[63] An

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challenged regulations were thus invalid, because they "fail[ed] to implement the statutory definition of wages in a consistent or reasonable manner." *Id.*

52 452 U.S. at 252-53 (citations omitted).

53 *Id.* at 253 (Court "can measure Commissioner's interpretation against specific provision in the Code . . .").

54 *Id.*

55 455 U.S. 16 (1982).

56 In *Vogel,* the Court reviewed the validity of Treas. Reg. § 1.1563-1(a)(3) (1981) (interpretation of "brother-sister controlled group" as used in I.R.C. § 1563(a)(2) (1976)).

57 455 U.S. at 24 (using language almost identical to that used in *Rowan Cos.).*

58 *Id.* (quoting United States v. Cartwright, 411 U.S. 546, 550 (1973)).

59 *Id.* (quoting *Rowan Cos.,* 425 U.S. at 253).

60 455 U.S. at 26 (though statutory language could support Treasury's interpretation, regulation must "harmonize . . . with the statute's 'origin and purpose' ") (quoting National Muffler Dealer's Ass'n v. United States, 440 U.S. 472, 477 (1979)).

61 455 U.S. at 26.

62 *Id.* at 34 ("Congress purposefully substituted the mechanical formula of § 1563(a)(2) for the subjective, case-by-case analysis that had previously prevailed.").

63 "[A]s with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (citations omitted); *see also* Johnson's Professional Nursing Home v. Weinberger, 490

administrative regulation must operate in harmony with,[64] and cannot contradict the terms of, the statute.[65] Courts typically read remedial legislation flexibly, rather than narrowly or strictly, to promote implementation of congressional purposes.[66] This approach, however, is appropriate only to the extent the legislation tolerates a flexible reading.[67] Although Congress can commit matters to an agency's discretion with very broad standards for guidance,[68] it may also preclude agency rulemaking by enacting rigidly detailed statutory provisions.[69] A court therefore must examine not only the grant of the authority, but also the individual provisions of the act to determine if the regulation contradicts any of those provisions.[70]

Although a regulation may survive the first stage of judicial review, a court should not uphold the regulation merely because it is not technically inconsistent with the language of the statute. A regulation must also be substantively consistent with the congressional intent of the statute.[71] An agency's rulemaking power is derivative;[72] it does not include the power to legislate. Even where the legislation grants broad rulemaking powers to any agency, that agency is bound by the specific language and congressional intent of the legislation.[73] A review of the statute's legislative history will help a court to determine the congressional intent

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F.2d 841, 844 (1974) ("Determining the regulations [sic] consistency with the statute requires examination of the language of each and of the statutory history and congressional purpose.").

64 *See* Ruiz v. Morton, 462 F.2d 818, 822 (1972), *aff'd,* 415 U.S. 199 (1974) ("[A]n administrative agency . . . has no power to create a rule or regulation that is out of harmony with the statutory grant of its authority.") (citations omitted); *see also* Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936) (when original regulation was unlawful, regulation as amended became controlling rule).

65 "[A] regulation to the extent it is in direct variance with an unambiguous statutory provision is clearly void." United States v. Maxwell, 278 F.2d 206, 210-11 (8th Cir. 1960) (citations omitted).

66 *See, e.g.,* Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972); Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 12 (1971); Tehereprin v. Knight, 389 U.S. 332 (1967); SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963).

67 *See supra* note 63; *see also* Northern Natural Gas v. O'Malley, 277 F.2d 128, 134 (8th Cir. 1960) ("The primary function of a regulation is to interpret an ambiguous statute and clarify its meaning. *If the statute is unambiguous, there is no room for construction. A right clearly created by statute cannot be taken away by regulation.*") (emphasis added).

68 *See* 1 K. DAVIS, *supra* note 40, §§ 1-6.

69 *Id.*

70 *See, e.g.,* Richards v. United States, 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and . . . 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.' " (footnotes omitted)) (quoting United States v. Boisdorie's Heirs, 49 U.S. (8 How.) 113, 122 (1850) *quoted in,* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956)).

71 *See supra* note 59 and accompanying text.

72 *See* 1 K. DAVIS, *supra* note 40, § 4.03; *see also supra* notes 43-51, 63-70 and accompanying text.

73 *Cf.* 3 L. LOSS, *supra* note 44.

and, thus, the propriety of the administrative action. Other indicia of the validity of regulation include the timing of its release[74] and its consistency with related rules.[75]

The remainder of this Note will demonstrate that in a challenge to the SEC's substantive tender offer timing rules a court is likely to find them invalid because they upset a congressionally mandated balance.[76]

III
WILLIAMS ACT TIMING PROVISIONS: A CONGRESSIONALLY SELECTED BALANCE

In drafting the Williams Act, Congress took extreme care to avoid favoring either the target management or the tender offeror. As the legislative history of this and subsequent legislation illustrates, Congress desired a neutral balance based on disclosure in tender offers. Both the SEC and the Supreme Court have recognized that this neutrality lies at the heart of the Williams Act.[77] Regulations under the Williams Act that tip this balance, therefore, contravene the congressional mandate.

A. The Legislative History

1. *1968 Hearings and Reports*

Congress carefully drafted the substantive timing provisions to avoid "tipping the balance of regulation" in favor of either bidder or incumbent management.[78] Congress acted cautiously,[79] knowing that the withdrawal and pro rata periods can determine the behavior of tender offer participants. Bidders often favor tender offers over proxy fights to gain control of a corporation because tender offers often provide an easier and faster means to accomplish the takeover.[80] Any regulation causing delay can unbalance the market forces and may

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74 A rule adopted contemporaneously with the passage of the statute under which it operates is generally more persuasive than a rule promulgated later. *See* 1 K. DAVIS, *supra* note 40, § 5.04.

75 *See* United States v. Leslie Salt Co., 350 U.S. 383, 393 (1956); Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936).

76 This review will demonstrate three propositions. First, that Congress intended § 14(d)(5) and (d)(6) of the Securities Exchange Act of 1934 to establish a minimum tender offer period, *see supra* note 9 and accompanying text. Second, that rule 14d-7, which extends the withdrawal period, and rule 14e-1, which establishes a minimum tender offer period, are of questionable validity. Third, that revised rule 14d-8 is patently invalid.

77 Edgar v. MITE Corp., 457 U.S. 624 (1982).

78 S. REP. NO. 550, *supra* note 2, at 3; H.R. REP. NO. 1711, *supra* note 2, at 4.

79 *See generally Takeover Bids: Hearing on H.R. 14475, S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 90th Cong., 2d Sess. (1968) [hereinafter cited as *1968 H. Hearing*]; *Full Disclosure of Corporate Equity Ownership and In Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency,* 90th Cong., 1st Sess. (1967) [hereinafter cited as *1967 S. Hearings*].

80 *See 1967 S. Hearings, supra* note 79, at 42 (statement of Sen. Kuchell).

determine the outcome in a takeover battle.[81]

In the original Senate version, the Williams Act provided for a seven calendar day withdrawal period and pro rata rights throughout the tender offer period.[82] The SEC advocated that both withdrawal and pro rata rights exist throughout the tender offer period.[83] The SEC also sought a specific grant of rulemaking authority to adjust the proration period if "necessary or appropriate in the public interest or for the protection of investors."[84] The SEC chairman stressed that only with broad rulemaking authority could the Commission adequately police the rapidly evolving techniques employed by both sides in a tender offer.[85]

Congress, however, did not follow the suggestions of the SEC. Instead, it reduced the proration period to ten calendar days[86] and limited the withdrawal period to seven calendar days.[87] Although Congress granted the SEC some rulemaking authority to act in "special situations" under the withdrawal provision, section 14(d)(5),[88] Congress did

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81 *See* S. REP. NO. 550, *supra* note 2, at 4; *see, e.g.,* Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1278 & n.49 (5th Cir. 1978) (Congress recognized that delay can impede tender offer significantly). Commentators, for example, have severely criticized the delay caused by state takeover laws. *See, e.g.,* Langevoort, *State Tender Offer Legislation: Interests, Effects and Political Competency,* 62 CORNELL L. REV. 213, 238 (1977) ("waiting period" and "hearing" provisions in state tender offer legislation primarily serve to discourage tender offers). Full proration periods delay takeovers by precluding bidders from purchasing any shares until the end of the tender offer period. The 10-day proration period, by contrast, subjects bidders to less risk by allowing them to purchase on a first-come, first-served basis after 10 days. The SEC's extension of the withdrawal period under rule 14d-7 requires bidders to wait 15 days before making any purchases. The SEC acknowledged in proposing revised rule 14d-8 that "the longer the proration period . . . the greater the possibility that the bid will be defeated through defensive tactics of the subject company [e.g., litigation] or higher offers by others." SEC Rel. 18,761, *supra* note 18, at 24,338. In its amicus brief to the Supreme Court in Edgar v. MITE Corp., 457 U.S. 624 (1982), the SEC listed other ways in which delay could shift the balance to favor target management. Brief for Securities and Exchange Commission as Amicus Curiae at 10 n.8, Edgar v. MITE Corp., 457 U.S. 624 (1982); *see also* Kennecott Corp. v. Smith, 637 F.2d 181, 188-89 (3d Cir. 1980) (delay unduly benefits target management, thereby undermining "market approach" established by Williams Act to protect investors).

82 The original House bill complied fully with the SEC recommendations for full-length withdrawal and proration periods. The Senate, however, referred the bill to the House with limited withdrawal and proration periods. This version was adopted by the full Congress. *1968 H. Hearings, supra* note 79, at 18; *1967 S. Hearings, supra* note 79, at 11-12; S. REP. NO. 550, *supra* note 2, at 4-5.

83 *1967 S. Hearings, supra* note 78, at 9-41, 197-98.

84 *Id.* at 38 (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission).

85 *Id.* at 30. The SEC gave similar testimony at the hearings on the 1970 amendments. *See infra* notes 99-107 and accompanying text. Furthermore, the SEC asserted that congressional delegation of rulemaking authority in § 14(e) was intended to serve this policing function. *See* SEC Rel. 18,761, *supra* note 18, at 24,339.

86 Securities Exchange Act of 1934, § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1982); *see also* S. REP. NO. 550, *supra* note 2, at 4-5, 10; H.R. REP. NO. 1711, *supra* note 2, at 10-11.

87 Securities Exchange Act of 1934, § 14(d)(5), 15 U.S.C. § 78n(d)(5) (1982).

88 Congress included a specific grant of rulemaking power in § 14(d)(5), "except as the

not delegate comparable rulemaking authority within the pro rata provision, section 14(d)(6).[89]

In large part, the testimony of security industry and academic commentators prompted these changes.[90] Generally, these commentators argued that full-length withdrawal and pro rata rights would delay tender offers and thereby give target management time in which to take defensive steps against the successful completion of the takeover.[91] This, they suggested, was unfair to bidders. Additionally, tendering shareholders risked tying up stock for lengthy periods without knowing what portion, if any, would be purchased.[92] This uncertainty of outcome could greatly increase the risk to arbitrageurs and thereby disrupt the trading markets.[93] If government regulation interfered with the flexibility re-

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Commission may otherwise prescribe by rules, regulations, or orders as necessary or appropriate in the public interest or for the protection of investors." However, the reports, accompanying the Act suggest that the SEC could vary the terms of the provision only in "special situations." S. REP. NO. 550, *supra* note 2, at 10; H.R. REP. NO. 1711, *supra* note 2, at 10.

89 The express delegations of rulemaking authority in other sections of the Williams Act and the omission of such a provision from § 14(d)(6) strongly suggests that Congress did not intend to confer such power on the SEC in this area. *Cf.* Addison v. Holly Hill Fruit Prods., 322 U.S. 607, 617 (1944) (detailed and particular exemptions "preclude their enlargement by implication"); State Highway Comm'n v. Volpe, 479 F.2d 1099, 1114 (8th Cir. 1973); Aloca S.S. Co. v. Federal Maritime Comm'n, 348 F.2d 756, 758 (D.C. Cir. 1965).

90 S. REP. NO. 550, *supra* note 2, at 4-5.

91 One commentator explained:

> [I]f pro rata acceptance is made mandatory for the entire period of the tender offer, it will cause most investors to delay their decisions for an unnecessarily long period and thus give the incumbent mangement an unfair time advantage for launching the powerful counteroffensive moves which are available to it.

1967 S. Hearings, *supra* note 79, at 59 (statement of Professor S.L. Hayes, III, Graduate School of Business, Columbia University). The officials of the New York Stock Exchange also criticized the SEC's recommendations: "We agree with the remarks at the hearings to the effect that to allow the Commission to promulgate rules and regulations covering [pro rata periods] of tender offers would, in all likelihood, cause more problems than it would solve." *Id.* at 93 (statement of Donald L. Calvin and Phillip L. West, Vice Presidents, New York Stock Exchange); *see also id.* at 69-86. Other commentators generally agreed with the position of the New York Stock Exchange. *Id.* at 131, 164, 171 (statement of Ralph S. Saul, President, American Stock Exchange). In contrast, officials from the American Stock Exchange specifically recommended that Congress grant the SEC rulemaking authority to cover proration rights. *Id.* at 100.

92 Donald L. Calvin, Vice President, New York Stock Exchange, stated that "the unlimited pro rata period in H.R. 14475 will work to the detriment of the investing public," and described some of the problems he foresaw that would attend an unlimited pro rata period. *1968 H. Hearings*, *supra* note 46, at 30.

93 The President of the New York Stock Exchange hypothesized:

> Market disruptions would also be more likely under a requirement that all tender offers must be made on a pro rata basis. . . . [I]t would [increase] both the length of tender offers and the time in which large blocks of stock [are] tied up. Withdrawing a sizable amount of a company's outstanding securities from the market for an extended period can drastically reduce the supply of stock available for trading. A limited supply of stock can produce abnormal price fluctuations.

1967 S. Hearings, *supra* note 79, at 90 (statement of G. Keith Furston, President, New York quired to structure offers and counteroffers, then they would begin to replace natural market forces in determining the outcome of tender offers.[94] The commentators pointed to the New York Stock Exchange's ten-day proration rule as a workable compromise for the more troublesome pro rata question.[95]

Moreover, tender offers were widely favored at that time due to a general belief that they benefitted stockholders by offering a premium for their stock over the prevailing market price[96] and by providing an efficient means to oust incompetent management.[97] In light of this legislative history, changes to the timing provisions, other than a "special situation" extension of the withdrawal period, upset a congressionally selected balance and are of doubtful validity.

2. *1970 Amendments: Hearings and Reports*

Two years after passing the Williams Act, Congress amended it to broaden the reach of the legislation.[98] Of particular importance is the addition of a second sentence to section 14(e). This addition gave the SEC rulemaking authority to "define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."[99] The SEC now asserts that Congress, in amending the Act, recognized the inadequacy of the statutory scheme enacted two

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Stock Exchange); *see also 1968 H. Hearings, supra* note 79, at 50 ("Market disruptions would . . . be more likely under a requirement that all tender offers be made on a pro rata basis for the entire period.") (statement of Donald L. Calvin, Vice President, New York Stock Exchange).

94 *See 1967 S. Hearings, supra* note 79, at 77 (testimony of Donald L. Calvin, Vice President, New York Stock Exchange).

95 *Id.; id.* at 62 (statement of Professor S.L. Hayes, III, Graduate School of Business, Columbia University).

96 Senator Javits recognized on the floor of the Senate that "[s]ometimes stockholders do very well because of tenders . . . ." 113 CONG. REC. 24,665 (1967). Senator Kuchel, as a solitary voice, criticized tender offers. *Id.* at 857-58.

97 S. REP. NO. 550, *supra* note 2, at 3. Many commentators have recently criticized tender offers for tying-up large amounts of money that should be spent on capital investment to create more jobs. *See Supreme Court Rejects Challenge to Re-registration of Redeemed Securities* [Jan.-June] SEC. REG. & L. REP. (BNA) No. 543, at A-13 (Mar. 5, 1980) (SEC Chairman Williams testifies before House Small Business Antitrust and Restraint of Trade Subcomm. on Feb. 27, 1980). Other commentators rejoin that tender offers permit the "market forces" to allocate resources most efficiently by giving them to the party offering the highest consideration, for whom, presumably, the assets are most valuable. H.R. REP. NO. 1373, 94th Cong., 2d Sess. 12 (1976) ("The very possibility of a successful tender offer may exert a pro-competitive influence in the market place by keeping incumbent management 'on their toes,' and by forcing them to keep their firm efficient and successful."); *see* Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer,* 94 HARV. L. REV. 1161, 1173-74 (1981) (prospect of hostile tender offers effectively monitors work of incumbent management and, in process, benefits all parties); Fischel, *Efficient Capital Market Theory: The Market for Corporate Control, and the Regulation of Cash Tender Offers,* 57 TEX. L. REV. 1, 5, 27-28, 45 (1978).

98 *See supra* notes 10-11 and accompanying text.

99 *1970 Amendments, supra* note 10, at § 5. For the text of § 14(e) of the Securities Exchange Act of 1934, see *supra* note 13.

years earlier[100] and authorized the agency to change the substantive timing of tender offers, even though such changes alter the previously selected balance.[101] The legislative history of the 1970 amendments, however, offers, at best, only ambiguous support for the SEC assertion.

Remarks made by Senator Williams at the opening of the 1970 amendment hearings shed some light on the nature and scope of section 14(e) rulemaking authority.

> The techniques currently being used in these offers have become increasingly sophisticated and they change rapidly. This is particularly true when the takeover is resisted by incumbent management. . . .
>
> Claims and counterclaims, charges and countercharges are hurled back and forth. Efforts are made to influence the price of the securities involved.
>
> The bill before us would add to the Commission's rulemaking power and enable it to deal promptly and with flexibility with this rapidly changing problem.[102]

The remaining legislative history of section 14(e), however, contains little reference to the scope of the rulemaking authority Congress intended to delegate to the SEC and does not address "specifically its effect on or relation to Section 14(d)(6) and the express, unambiguous 10 day period contained therein."[103] The reports accompanying the bill describe congressional intent in the amendment in a single sentence: "The purpose of this provision is to allow the Commission to deal more effectively with the devices sometimes employed on both sides in contested tender offers."[104]

The emphasis on administrative flexibility in the face of the sophisticated and rapidly changing tender offer techniques represents a typical delegation of authority in deference to agency expertise.[105] No evidence suggests that the amendment granted the SEC authority to adopt regulations that not only contradict the unambiguous terms of the statute but also upset the congressionally selected balance contained in sections 14(d)(5) and 14(d)(6). It would be anomalous for Congress first to ex-

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100 SEC Rel. 18,761, *supra* note 18, at 24,339.

101 *Id.* at 24,338 (Recognizing that a longer proration period enhances "the possibility that the bid will be defeated").

102 *Additional Consumer Protection in Corporate Takeovers and Increasing the Securities Act Exemptions for Small Businessmen: Hearing on S. 336 and S. 3431 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency,* 91st Cong., 2d Sess. 2 (1970) [hereinafter cited as *1970 S. Hearings*]; *see also* 116 CONG. REC. 3024 (1970) ("The Commission must be given full rulemaking powers in order to deal with these rapidly changing problems.") (statement of Sen. Williams).

103 SEC Rel. 19,336, *supra* note 18, at 57,681 (Treadway, Comm'r, dissenting).

104 S. REP. NO. 1125, 91st Cong., 2d Sess. 4 (1970) [hereinafter cited as S. REP. NO. 1125]; H.R. REP. NO. 1655, 91st Cong., 2d Sess. 4, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5025, 5028 [hereinafter cited as H.R. REP. NO. 1655].

105 *See generally* ROBINSON, *supra* note 40; 1 K. DAVIS, *supra* note 40, § 1.

tend the substantive timing requirements to tender offers not previously covered by the Williams Act[106] and then, in the same legislation, to delegate authority to the SEC to retract the same requirements.[107] The Commission asserts that Congress granted it "full rulemaking authority" in 1970,[108] yet the timing provisions of the Williams Act remained unchanged and the legislative history of section 14(e) cannot support the SEC's broad interpretation.

3. *The Hart-Scott-Rodino Act*

Before the SEC adopted any regulations to alter the substantive timing provisions of the Williams Act, Congress enacted the Hart-Scott-Rodino Act.[109] The legislative history of this 1975 Act undermines the SEC's argument that in 1970 Congress considered the statutory scheme of 1968 to be inadequate and authorized the SEC to alter the timing schedule of sections 14(d)(5) and 14(d)(6).

The Hart-Scott-Rodino Act requires corporations to notify the Federal Trade Commission and the Justice Department before acquiring control of another corporation and, under certain conditions, to suspend their merger activities for a limited period of time. Congress hoped that the notification and waiting period requirements would give "the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated."[110] The Act established a thirty day premerger waiting period for most mergers. For cash tender offers, however, a "special, shortened, 21-day waiting period is provided . . . because of the unique time constraints involved in such mergers."[111]

In describing the provision of the Hart-Scott-Rodino Act, the committee report directly addresses the Williams Act timing provisions governing cash tender offers:

> [I]t is clear that this *short waiting period* was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This *ten-day waiting* period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards cash tender offers, by avoiding lengthly [sic] delays that might discourage their chances for success.[112]

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106 *See supra* notes 10-11.

107 *Accord* Comment Letter of Troutman, Sanders, Lockerman & Ashmore, *supra* note 37.

108 SEC Rel. 18,761, *supra* note 18, at 24,339.

109 Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (codified at 15 U.S.C. § 12 (1982)) [hereinafter cited as Hart-Scott-Rodino Act].

110 H.R. REP. No. 1373, 94th Cong., 2d Sess. 5 (1975) [hereinafter cited as H.R. REP. No. 1373].

111 *Id.* at 6.

112 *Id.* at 12 (emphasis added).

In 1975 Congress evidently believed that the withdrawal and proration periods had effectively established a minimum tender offer period. Congress's caution in imposing the Hart-Scott-Rodino requirements on top of those already required by the Williams Act strongly suggests that it considered the Williams Act timing provisions to be not only adequate, but also subject to revision only by the legislature.[113]

B. The Administrative Implementation

In July 1968, the SEC adopted "temporary" rules and regulations to implement the recently enacted Williams Act.[114] The adopted rules and regulations were exclusively oriented toward disclosure.[115] For example, Regulation 14D required bidders to file a completed information statement with the SEC before commencing a tender offer.[116] In 1970, the SEC amended these temporary rules to implement the changes wrought by the 1970 amendments.[117]

The SEC released its first comprehensive rulemaking proposals for tender offers under sections 14(e) and 23(a) in August 1976.[118] In this release, the SEC emphasized that "any efforts to benefit investors in this area must be made without tipping the balance of regulation in favor of either the bidder or the subject company."[119] Yet the SEC proposed regulations that significantly alter the congressionally selected bal-

113 *See* Edgar v. MITE Corp., 457 U.S. 624, 638 (1982) (White, J., plurality) (citing H.R. REP. NO. 1373, *supra* note 110, to support congressional affirmance of Williams Act's selected balance).

114 SEC Securities Exchange Act Release No. 8,370 (July 30, 1968), 33 Fed. Reg. 11,015 (1968) [hereinafter cited as SEC Rel. 8,370]. This release introduced Schedule 13D, the information statement that persons acquiring more than 10% (as originally drafted) of any equity security must file with the SEC, the issuer company, and the appropriate stock exchange. Rule 14d-1 required bidders in tender offers to file Schedule 13D. The SEC also presented Schedule 14D, the information statement that the management of the target corporation must file before making any recommendations to its shareholders regarding the tender offer, as well as rules governing the filing procedure. The agency also adopted rule 13e-1, 17 C.F.R. § 240.13e-1 (1982), governing an issuer's purchases of its own securities subject to a tender offer. SEC Securities Exchange Act Release Nos. 8,391 (Aug. 30, 1968), 33 Fed. Reg. 13,036 (1968), 8,510 (Jan. 31, 1969), 34 Fed. Reg. 2354 (1969), and 8,556 (Mar. 24, 1969), 34 Fed. Reg. 6,101 (1969) contain subsequent amendments to these temporary rules.

115 Although the rules required that no bidder could make a tender offer without filing Schedule 13D, these rules did not regulate the actual terms of the tender offer. *See* SEC Rel. 8,370, *supra* note 114, at 11,015-16. Thus, the rules only governed disclosure and, unlike substantive timing rules, did not regulate economic aspects of the offer.

116 *Id.* at 11,016.

117 SEC Securities Exchange Act Release No. 9,060 (Jan. 18, 1971), 36 Fed. Reg. 976 (1971). The SEC changed the filing requirement rules to lower the §§ 13(d) and 14(d) "trigger" from 10% to 5%, to include insurance company equity stock under the Williams Act, and to include "stock for stock" exchanges. *See supra* note 11 and accompanying text.

118 SEC Rel. 12,676, *supra* note 30. For a discussion of § 23(a) see *infra* notes 182-88 and accompanying text.

119 SEC Rel. 12,676, *supra* note 30, at 143 (paraphrasing S. REP. NO. 550, *supra* note 2, at 3 and H.R. REP. NO. 1711, *supra* note 2, at 4).

ance.[120] The rules included: (1) a fifteen business day minimum tender offer period;[121] (2) a ten business day withdrawal period;[122] and (3) an exemption from section 14(d)(6) to permit bidders to voluntarily extend the proration period for the length of the tender offer.[123] Ultimately, the SEC only adopted rules governing disclosure.[124] In the adopting release, the agency again acknowledged that it must not tip the balance between bidder and subject company, and it left as proposals those substantive regulations that would have adjusted the withdrawal and proration periods.[125]

Two years later the SEC withdrew the unadopted 1976 proposals and introduced another set of regulations along with proposed amendments to existing regulations.[126] The agency stated that

> [the new] proposals are necessary and appropriate in the public interest and for the protection of investors because of the increased occurrence of tender offers; their impact on securities markets and on corporate control; the dynamic natures of these transactions; and the need to ensure a balance [between the bidder and the target management] while providing disclosure and substantive protections to shareholders . . . .[127]

Once again the SEC acknowledged the limits of its authority and stated that its primary objective under the Williams Act was "to provide investor protection in takeover situations rather than to regulate tender offers as an economic phenomenon."[128] Nevertheless, the SEC adopted sub-

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120 The SEC acted to "insure that investors have an adequate opportunity to consider communications from the bidder as well as the subject company in deciding whether to sell, tender or hold part or all of their securities . . . ." SEC Rel. 12,676, *supra* note 30, at 144. The SEC also proposed rule 14d-6 governing integration of purchases of securities by the bidder "before the commencement of the tender offer or after its termination." *Id.* at 147. This proposed integration rule has not been adopted.

121 *Id.* at 150 (proposed rule 14e-2).

122 *Id.* at 147 (proposed rule 14d-5).

123 *Id.* at 148 (proposed rule 14d-8 "is designed to resolve any doubts among practitioners that a bidder can extend pro rata acceptance rights for the entire length of the tender offer period without" transgressing § 14(d)(6)).

124 SEC Securities Exchange Act Release No. 13,787 (Aug. 2, 1977), 12 SEC Docket 1256 (1977) [hereinafter cited as SEC Rel. 13,787]. In this release, the SEC adopted Schedule 14D-1, a new tender offer statement, and amended the rules governing filing and disclosure requirements.

125 The SEC announced that, following a review of these proposals, it anticipated taking further rulemaking action. *Id.* at 1,257.

126 SEC Rel. 15,548, *supra* note 2.

127 *Id.* at 973.

128 *Regulation Under Federal Banking and Securities Laws of Persons Involved in Corporate Takeovers: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 94th Cong., 2d Sess. 87 (1976) (statement of Phillip Loomis, Comm'r, Securities Exchange Commission). An interesting exchange occurred during Commissioner Loomis's testimony:

> The Chairman (Senator Proxmire): In your statement you say the SEC is not empowered to regulate tender offers as an economic phenomenon and that the SEC's regulation is limited to the extent necessary to accomplish the pur-

stantive regulations[129] that alter the statutory timing provisions and thereby affect the economics of tender offers.[130]

These substantive rules included a twenty business day minimum tender offer period,[131] a fifteen business day withdrawal period,[132] and a voluntary extension of the pro rata rights.[133] The SEC adopted these provisions, however, amid controversy. Commentators questioned whether the SEC had the statutory rulemaking authority to adopt provisions that arguably transcend disclosure and supersede the statutory framework.[134] For example, "[c]ertain commentators questioned the Commission's authority to extend the withdrawal period beyond that provided in Section 14(d)(5)."[135] The SEC relied on a specific grant of rulemaking authority contained within the withdrawal period provision, section 14(d)(5), to extend the withdrawal period to fifteen days.[136] Congressional reports accompanying the Williams Act, however, suggest that the agency lacks the authority to extend the period except in "special situations."[137] Moreover, although Congress did not mandate a minimum tender offer period per se, the seven calendar day withdrawal

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> pose of investor protection . . . . Now, that phrase "in the public interest" implies the SEC's authority is broader than the goal of investor protection.
> Mr. Loomis: As I recall that relates to disclosures. We can require whatever disclosure is necessary, but I don't think we can go much beyond disclosure.
> The Chairman: I don't disagree with that.

Id. at 126-27.

129 SEC Rel. 15,548, *supra* note 2. In this release the SEC divided the proposed rules into four categories: filing requirements, dissemination provisions, disclosure requirements, and substantive regulatory provisions. *Id.* at 973. The substantive rules included: rule 14e-1, requiring that tender offers remain open for 30 business days; rule 14d-7, extending the withdrawal period to 15 business days; rule 14d-8, integrating certain of the bidder's purchases of target company stock other than from the tender offer; rule 14d-9, creating a voluntary exemption from § 14(d)(6); and rule 14e-2, regulating trading in shares prior to the announcement of the tender offer if traded on the basis of nonpublic material information "that enables the [purchaser] to know . . . that the bidder will make a tender offer." *Id.* at 1009.

130 SEC Rel. 16,384, *supra* note 14.

131 The SEC amended rule 14e-1, 17 C.F.R. § 240.14e-1 (1983), to require a 20 business day tender offer period rather than the proposed 30 business days in response to criticism that a 30-day period was unnecessarily and unfairly long. SEC Rel. No. 16,384, *supra* note 14, at 1071; *see infra* notes 138-39 and accompanying text.

132 SEC Rel. 16,384, *supra* note 14, at 1066. Rule 14d-7, extending the withdrawal period to 15 business days, is now codified at 17 C.F.R. § 240.14d-7 (1983).

133 SEC Rel. 16,384, *supra* note 14, at 1067-68. Proposed rule 14d-9 governing pro rata rights was renumbered as rule 14d-8 (now replaced by revised rule 14d-8) and was codified at 17 C.F.R. § 240.14d-8 (1983). Proposed rules 14d-8 and 14e-2 were not adopted. SEC Rel. 16,384, *supra* note 14, at 1072.

134 *See* SEC Rel. 16,384, *supra* note 14, at 1063. For specific comments in response to SEC Rel. 15,548, *supra* note 2, see file No. S7-770, SEC Public Reference Room.

135 SEC Rel. 16,384, *supra* note 14, at 1067.

136 *Id.*; *cf. id.* at 1073 ("The Commission notes, however, that Section 14(d)(5) expressly grants the authority to vary the statutory periods 'as necessary or appropriate in the public interest or for the protection of investors.' ") (quoting § 14(d)(5) of the Securities Exchange Act of 1934).

137 S. REP. NO. 550, *supra* note 2, at 10; H.R. REP. NO. 1711, *supra* note 2, at 10.

and ten calendar day proration provisions effectively accomplished this goal.[138] Thus, the SEC's adoption of a twenty business day minimum tender offer period in rule 14e-1 arguably transgresses the congressional framework established in 1968.[139]

In May 1982, the SEC proposed mandatory pro rata rights throughout the tender offer period "[n]otwithstanding the pro rata provisions of Section 14(d)(6) of the Act . . . ."[140] This proposal, revising rule 14d-8, was promulgated pursuant to the SEC's alleged "full rulemaking authority,"[141] rather than under a specific grant of authority.[142] The SEC acknowledged that in 1968 Congress enacted a ten-day pro rata period and denied SEC requests for pro rata rights throughout the tender offer period and for specific pro rata rulemaking authority.[143] Nonetheless, the SEC adopted revised rule 14d-8,[144] which directly contradicts the congressionally selected ten-day proration period of section 14(d)(6).[145]

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138 *See supra* note 9 and accompanying text.

139 *Cf.* Statement of SEC Comm'r Evans at the Conference on Securities Regulations in Houston, Tex. (Dec. 12, 1979), *reported in* SEC REG. & L. REP. (BNA) No. 532, A-20 (rule 14e-1 would affect "balance," because longer tender offer stays open, more likely it is that target management can defeat it). In support of this minimum tender offer period, the SEC argued that "[t]ender offers which do not stay open for a reasonable length of time increase the likelihood of hasty ill-considered decision making. . . . The Commission therefore believes that a minimum period of twenty business days is necessary." SEC Rel. 16,384, *supra* note 14, at 1071. The proposals would "alleviate undue pressure on security-holders without unduly hindering the person making a tender offer." *Id.* Congress, however, had previously determined that the statutory withdrawal and proration periods would adequately serve those same purposes. *See* S. REP. NO. 550, *supra* note 2, at 3. The SEC argued that new developments rendered the statutory scheme inadequate. SEC Rel. 16,384, *supra* note 14, at 1053. Nevertheless, an administrative agency cannot revise inadequate statutory provisions through administrative rules. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99, 109 (1970); Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 617 (1944); *see also* SEC Rel. 19,336, *supra* note 18, at 57,680 (Shad, Chairman, dissenting) ("[I]f the passage of time indicates changes are needed in a congessionally established regulatory scheme, an agency must go to Congress, rather than implement changes by regulation.").

140 SEC Rel. 18,761, *supra* note 18, at 24,341. In a letter attacking the proposed rule 14d-9 (now revised rule 14d-8), the Securities Industry Association noted: "Although the proposed rule has the refreshing virtue among regulatory initiatives of being only one sentence in length, its simplicity is deceptive." Comment Letter of the Federal Regulations Committee of the Securities Indus. Ass'n (Sept. 14, 1982) (in file No. S7-933, SEC Public Reference Room).

141 SEC Rel. 18,761, *supra* note 18, at 24,339.

142 *See supra* note 6 (text of § 14(d)(5)). *But cf. supra* notes 134-38 and accompanying text.

143 *See supra* notes 138-39 and accompanying text.

144 SEC Rel. 18,761, *supra* note 18; SEC Rel. 19,336, *supra* note 18, at 57,679 n.2.

145 *Compare* § 14(d)(6) of the Securities Exchange Act of 1934:

> Where any person makes a tender offer . . . for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto *within ten days* . . . than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata . . . according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration . . . .

C. Supreme Court Interpretations of the Williams Act

In two cases, *Piper v. Chris-Craft Industries, Inc.*[146] and *Edgar v. MITE Corp.*[147] the Supreme Court analyzed the Williams Act and the congressional purposes behind it.[148] The Court's opinions undermine the SEC's position with respect to its authority to enact substantive timing rules and cast doubt upon the validity of these regulations.

1. Piper v. Chris-Craft Industries, Inc.

In *Piper,* the Supreme Court examined the congressional purposes underlying the Williams Act in deciding whether a defeated tender offeror had an implied private right of action under section 14(e) against target management. Acknowledging that the statute was silent on the private rights of tender offerors, the Court warned that "[r]eliance on legislative history in divining the intent of Congress is . . . a step to be taken cautiously."[149] Chris-Craft and the SEC asserted that Congress intended to establish "a policy of even-handedness in takeover legislation,"[150] and that defeated tender offerors should have a private right of action.[151] The Court dismissed this argument stating that "this policy . . . does not go . . . to the purpose of the legislation;"[152] rather, the purpose was "solely to get needed information to the investor."[153] The Court concluded that the "sole purpose of the Williams Act was the

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15 U.S.C. § 78(d)(6) (1982) (emphasis added); *with* revised rule 14d-8:

> *Notwithstanding the pro rata provision of Section 14(d)(6) of the Act,* if any person makes a tender offer . . . for less than all of the outstanding equity securities of a class, and if a greater number of securities are deposited pursuant thereto than such person is bound or willing to take up and pay for, the securities taken up and paid for shall be taken up and paid for as nearly as may be pro rata . . . according to the number of securities deposited by each depositor during the period such offer . . . remains open.

17 C.F.R. § 240.14d-8 (1983) (emphasis added).

146 430 U.S. 1 (1977).

147 457 U.S. 624 (1982).

148 *See also* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975) ("Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock . . . ."); San Francisco Real Estate Investors v. Real Estate Inv. Trust of Am., 692 F.2d 814, 818 (1st Cir. 1982) ("Congress drew the line between the interest in 'more information' and the interests of the offeror in obtaining a quick decision when it established a minimum ten day proration period . . . .").

149 *Piper,* 430 U.S. at 26.

150 *Id.* at 29.

151 This conclusion on a private right of action is the only contention rejected by the Court. *See infra* text accompanying notes 155-57.

152 *Piper,* 430 U.S. at 29.

153 *Id.* at 31. ("Senator Williams articulated this singleness of purpose, even while advocating neutrality: 'We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids. *S. 510 is designed solely to require full and fair disclosure for the benefit of investors.*'" *Id.* (quoting 113 CONG. REC. 24,664 (1967) (remarks of Sen. Williams) (emphasis added by Court)).

The Court's emphasis on the disclosure aspect of investor protection is significant and protection of investors" and that Chris-Craft had no implied cause of action.[154]

Although *Piper* appears to negate the assertion that Congress intended a policy of evenhandedness between bidders and target management, this conclusion ignores most of *Piper*'s discussion. For example, the Court stated that "Congress was indeed committed to a policy of neutrality in contests for control . . . . Neutrality is . . . one characteristic of legislation directed toward a different purpose—the protection of investors."[155] The Court recognized that the congressionally selected balance was crucial in " 'plac[ing] investors on an equal footing with the takeover bidder' . . . without favoring either the tender offeror or existing management."[156] Thus, while accepting the proposition of a congressionally selected balance, the Court found that "the congressional policy of 'evenhandedness' is nonprobative of the quite disparate proposition that the Williams Act was intended to confer rights for money damages upon an injured takeover bidder."[157]

Although a superficial reading of *Piper* tends to support the SEC's position concerning the propriety of adjusting the timing provisions, a full reading of *Piper* belies that conclusion. Moreover, the SEC's own efforts to preempt state takeover laws has considerably weakened the remaining strength of this interpretation.[158]

2. Edgar v. MITE Corp.

In June 1982, the Supreme Court decided *Edgar v. MITE Corp.*,[159] and expressly reinforced *Piper*'s implicit recognition of the congressionally selected balance. In *MITE*, the Court struck down the Illinois Business Takeover Law as a violation of the commerce clause.[160] It held that "the possible benefits of the potential delays required by the [Illinois Business Takeover] Act may be outweighed by the increased risk that the tender offer will fail due to defensive tactics employed by incumbent management."[161] Specifically, the Court affirmed the Seventh

shows that it accorded disclosure considerably more weight than the "congressional balance" contained in the timing provisions. This may be explained, in part, by the fact that these twin aspects of investor protection were not both at issue in *Piper*. *See infra* text accompanying notes 155-57.

154 *Piper*, 430 U.S. at 35.

155 *Id.* at 29.

156 *Id.* at 30 (citation omitted).

157 *Id.* at 31.

158 In 1979, the SEC adopted rule 14d-2b, which created such a direct and substantial conflict between the Securities Exchange Act of 1934 regulations and state takeover statutes "as to make it impossible to comply with both." SEC Rel. 16,384, *supra* note 14, at 1060. The SEC thus initiated a process in which federal regulations preempted many state takeover laws. *See infra* notes 159-67 and accompanying text.

159 457 U.S. 624 (1982).

160 *Id.* at 643.

161 *Id.* at 645.

Circuit's finding[162] that these potential delays caused a substantial burden on interstate commerce, by exceeding the timing requirements of the Williams Act.[163]

Both sides to the litigation as well as the SEC as amicus presented the critical issue as whether Congress intended the Williams Act to create a definitive balance.[164] Throughout its amicus brief, the SEC in uncompromising terms focused on the adverse effects of delay in tender offers. The SEC argued that the Illinois law conflicted with the "free market" approach that Congress endorsed in the Williams Act and disturbed the congressionally selected "balance between the interests of affected persons . . . ."[165] The Illinois Act provided for preliminary review and hearing by state officials but also included substantive timing provisions that conflicted with the statutory requirements of the Williams Act. These provisions included a twenty-day minimum tender offer period, a seventeen-day withdrawal period, and proration rights throughout the tender offer period.[166]

A plurality of the Court agreed with the SEC and found congressional intent to include a neutral balance. In Part III of the opinion, the Court addressed *Piper:* "There is no question that in imposing these requirements, Congress intended to protect investors. But it is also crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder."[167] The plurality, as well as each concurrence, recognizes that delay harms neutrality. Ironically, to support its substantive timing regulations, the SEC must abandon the position successfully argued in *MITE*.

IV
The Invalidity of the SEC Substantive Timing Rules for Tender Offers

The SEC's substantive timing rules for tender offers either contradict or ignore the congressionally selected balance of the Williams Act and are invalid under administrative law principles. Until the rules are judicially reviewed, they will continue to tip the balance of regulation in favor of the target management contrary to the underlying intent of the

162 MITE Corp. v. Dixon, 633 F.2d 486, 502 (7th Cir. 1980).

163 *MITE,* 457 U.S. at 644-45.

164 Brief for Appellant at 17, Edgar v. MITE Corp., 457 U.S. 624 (1982) (critical issue was whether Congress had intended for Williams Act to create "a definitive balance between the offeror and incumbent management"); Brief for Appellee at 24, Edgar v. MITE Corp., 457 U.S. 624 (1982) ("To achieve a neutral balance in the Williams Act which favored neither an offeror nor target management, Congress adopted a 'market approach' . . . ."); *infra* text accompanying note 165 (Brief for Securities and Exchange Commission as Amicus Curiae, Edgar v. MITE Corp., 457 U.S. 624 (1982)).

165 Brief for Securities and Exchange Commission as Amicus Curiae at 7, *Edgar v. MITE*.

166 Ill. Rev. Stat. ch. 121.5, § 137.59, ¶¶ B, C, D (1978).

167 *MITE,* 457 U.S. at 633 (citiations omitted).

Williams Act. Congress should remove the uncertainty surrounding the SEC's rulemaking authority for timing provisions of tender offers, and reset the balance itself or clearly delegate such power to the SEC.

Rule 14d-8 directly contradicts the plain, unambiguous language of section 14(d)(6). This alone should be sufficient to invalidate this regulation.[168] The legislative history of section 14(d)(6) also undermines the SEC's implicit position that the section merely establishes a minimum period.[169] In early drafts, the Williams Act provided for a full-length proration period. Before enactment, however, Congress rejected full-length proration and reduced the proration period to ten days.[170]

Rule 14d-7, although technically consistent with the language of section 14(d)(5), is inconsistent with the reports accompanying the Williams Act that restrict the SEC's section 14(d)(5) rulemaking authority to "special situations."[171] Similarly, rule 14e-1, which requires a minimum twenty business day tender offer period, is inconsistent with the de facto tender offer periods of the Williams Act.[172] Moreover, the hearings and reports accompanying the Williams Act, as well as later, related bills, suggest that Congress intended both the withdrawal and proration periods to be inflexible.[173]

The SEC contends that in 1968 Congress did not foresee the problems that attend the short proration period and that sections 23(a) and 14(e) authorize it to promulgate substantive timing rules.[174] The SEC, in enacting rule 14d-8, sought to correct the anomalous situation in which shareholders faced with the "inordinately complex investment decisions" surrounding a partial tender offer had ten days in which to decide while those faced with "any and all" offers had at least fifteen days.[175] Yet this anomaly results from rule 14e-1.[176] Moreover, to invoke section 14(e) requires a finding that "compliance with the express 10 day period of Section 14(d)(6) either is, or is at least closely akin to, 'fraudulent, deceptive, or manipulative' activity."[177] The SEC failed to make such showing;[178] it instead relied on the legislative history behind

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168 *See supra* notes 65-70 and accompanying text.

169 *See supra* note 26.

170 *See supra* notes 78-86 and accompanying text.

171 *See supra* note 88 and accompanying text.

172 *See supra* note 9 and accompanying text.

173 *See supra* notes 92-97 and accompanying text; text accompanying notes 109-13.

174 SEC Rel. 19,336, *supra* note 18, at 57,679 n.2.

175 *See* Fogelson & Kapp, *The Emergence of Proration Pools and Two-Tier Offers as Desired Structures for Acquisitions,* 1 FOURTEENTH ANNUAL INST. ON SEC REG. HANDBOOK 581, 606-07 (1982); *see also supra* note 28.

176 *See* 17 C.F.R. § 240.14e-1 (1983). Congress avoided such an anomalous result in the Williams Act by making the proration period longer than the withdrawal period; 10 and seven calendar days, respectively.

177 SEC Rel. 19,336, *supra* note 18, at 57,681 (Treadway, Comm'r, dissenting).

178 The SEC's broad interpretation of § 14(e) is longstanding. For example, in 1970, in response to a request from the Senate to illustrate the fraudulent practices that the SEC

the 1970 amendments to assert that Congress recognized the inadequacy of the statutory scheme enacted two years earlier.[179]

Nor does section 23(a) provide adequate support for the SEC's argument.[180] Section 23(a) represents broad enabling legislation authorizing the SEC to implement the provisions of the Exchange Act.[181] For this reason, perhaps, the SEC releases concerning rule 14d-8 refer to section 23(a) only in footnotes.[182] To invoke section 23(a) as authority for revised rule 14d-8 is questionable; implementing section 14(d)(6) does not include rescinding it.[183] Such enabling provisions may often prompt lenient judicial review of regulations[184] but they cannot authorize administrative lawmaking or rescission of statutory provisions by rule.[185] As noted above, if the language of a statute is plain and unambiguous, the discretion and power of an agency is circumscribed.[186]

CONCLUSION

The plain, unambiguous language of the Williams Act timing provisions coupled with its legislative history preclude agency rulemaking in this area. The SEC's timing regulations cause delay, which favors the target management, contrary to Congress's mandate to avoid tipping the balance of regulation in favor of either the tender offeror or target

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might police with rules adopted pursuant to § 14(e), the SEC "came back with a list which manifests an intention to read 14(e) as broadly as possible." Brown, *The Scope of the Williams Act and its 1970 Amendments,* 26 BUS. LAW. 1637, 1647 (1971). For the text of this list, see *1970 S. Hearings, supra* note 75, at 12.

179 SEC Rel. 18,761, *supra* note 18, at 24,339.

180 The Securities Exchange Act of 1934, § 23(a)(1), 15 U.S.C. § 78w (1982), provides:

> The Commission . . . shall . . . have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter . . . or for the execution of the functions vested in [it] by this chapter, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser or different requirements for different classes thereof.

181 *Id.*

182 SEC Rel. 19,336, *supra* note 18, at 57,679 n.2; SEC Rel. 18,761, *supra* note 18, at 24,339 n.10.

183 *See* Fogelson & Kapp, *supra* note 175, at 608-12. The authors describe in detail the operation of the withdrawal and proration regulations and the current tender offer practices. They also discuss the questionable statutory authority supporting revised rule 14d-8.

184 *See supra* note 46. In Mourning v. Family Publications Servs., Inc., 411 U.S. 356, 369 (1973), the Supreme Court recited a typical and now oft-quoted standard for judicial review of agency rulemaking: "Where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' " (footnote and citations omitted). The regulation, however, must not contradict the terms of the statute. *See supra* notes 64-65 and accompanying text.

185 *See supra* note 46.

186 *See supra* notes 43-70 and accompanying text.

management.[187] These rules violate one of the primary purposes of the Williams Act and interfere with Congress's "market approach"[188] to investor protection. Moreover, at least two of the *Rowan* Court's[189] three supplemental factors suggest the rule's invalidity. First, the rules were promulgated more than twelve years after the statutory provisions they "clarify."[190] Second, Congress specifically endorsed the continuing importance of the very short waiting period in tender offers that these rules extended.[191]

The only conclusion for a court presented with a challenge to the SEC's substantive timing regulations is to find them invalid as an unreasonable implementation of the congressional mandate.[192] If the passage of time diminishes the effectiveness of the timing provisions and therefore requires changes "in a congressionally established regulatory scheme, an agency must go to Congress, rather than implement changes by regulation."[193] Such a decision or agency request will encourage Congress to eliminate the uncertainty that surrounds agency rulemaking in this area.

Congress should resolve this uncertainty either by clearly removing the statutory provisions from agency control or by expressly delegating to the SEC the authority to promulgate such substantive regulations. In light of the widespread revision of state takeover laws, it is particularly important that Congress update the federal legislation to account for

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187 *See supra* notes 152-53, 161 and accompanying text.

188 *See* Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1276-77 (5th Cir. 1978) ("The underlying purpose of the Williams Act is to protect investors . . . . Congress relied upon a 'market approach' to investor protection." Congress saw the importance of "avoiding regulation that puts the investor at a disadvantage to incumbent management," recognizing "that delay can seriously impede a tender offer."); *see also MITE,* 457 U.S. at 639 ("Congress anticipated investors and the takeover offeror to be free to go forward without unreasonable delay. The potential for delay . . . upset[s] the balance struck by Congress . . . .").

189 Rowan Cos. v. United States, 452 U.S. 247 (1981); *see supra* note 54.

190 Congress enacted the Williams Act timing provisions in 1968; the § 14(e) rulemaking authority in 1970. Rules 14d-7 and 14e-1 were promulgated in 1980; rule 14d-8 in 1982.

191 *See supra* notes 109-11 and accompanying text.

192 *Cf.* United States v. Vogel Fertilizer, 455 U.S. 16 (1982); Rowan Cos. v. United States, 452 U.S. 247 (1981).

Also consider San Francisco Real Estate Investors v. Real Estate Inv. Trust of Am., 692 F.2d 814 (1st Cir. 1982). The First Circuit reversed the district court's order that extended the proration period:

> Congress drew the line between the interest in "more information" and the interests of the offeror in obtaining a quick decision when it established a minimal ten day proration period in the Williams Act. Unless there is some special circumstance related to the district court's determination of likely illegality, we see no basis for changing the time limit that Congress enacted.

Id. at 818.

193 SEC Rel. 19,336, *supra* note 18, at 57,680 (Shad, Chairman, dissenting), *citing* H.K. Porter Co. v. NLRB, 397 U.S. 99, 109 (1970) and Addison v. Holly Hill Fruit Prods., 332 U.S. 607, 617 (1944).

recent changes in tender offer takeover practices and the SEC's rulemaking response. Congress must reset the balance.[194]

W. Brewster Lee, III

[194] The SEC announced that a full review of the tender offer rules will begin in March 1983. N.Y. Times, Mar. 1, 1983, at D7, col. 3. The Securities and Exchange Commission's Advisory Committee on Tender Offers issued its final report on July 8, 1983. *See SEC Advisory Panel Issues Report on Changes in Tender Offer Laws,* SEC REG. & L. REP. (BNA) No. 28, 1339-40 (July 15, 1983); *Exerpts From Final Report of SEC Advisory Committee on Tender Offers,* SEC REG. & L. REP. (BNA) No. 28, 1375-81 (July 15, 1983).