FRONT-END LOADED TENDER OFFERS: THE APPLICATION OF FEDERAL AND STATE LAW TO AN INNOVATIVE CORPORATE ACQUISITION TECHNIQUE

A major tactical development in the corporate takeover world has been the emergence and refinement of the front-end loaded, two-step tender offer. The tactic involves a single offer to acquire 100% control of a target corporation in two steps. In the first step the offeror acquires, usually for cash, some of the target company's shares. In the second step, the offeror acquires the remainder of the target’s shares in exchange for securities worth less than the cash paid in the first step.

The front-end loaded tender offer, or, as it is often called, the two-tiered tender offer, is an extremely strong and attractive acquisition technique for two reasons. First, it increases the offeror’s prospects for success because it prompts many target company shareholders to tender their stock quickly, before expiration of the first-step cash offer, and before the target can consolidate its defenses. Second, the two-tiered offer for 100% control is less expensive than a partial tender offer for control (with no mention of a second step) with the acquiror later deciding to acquire the remainder of the outstanding shares.

1 The major significance of this tactical development and the use of the colorful “front-end loaded” terminology is suggested in Fleischer, Sun Shines on Bidders in Corporate Takeover World, Legal Times of Wash., Jan. 25, 1982, at 15, col. 1.

This controversial new acquisition tactic was employed in the past two years by DuPont Co. in its successful bid for Conoco Inc., by U.S. Steel Corp. and Mobil Corp. in their bidding war for Marathon Oil Co., and by Martin Marietta in its bid for Bendix. See Wall St. J., May 14, 1982, at 4, col. 1; id., Aug. 31, 1982, at 3, col. 1.

2 Fleischer, supra note 1, at 15, col. 1.

3 Id.

4 See infra notes 53-56 and accompanying text.

5 Acquiring companies normally pay a substantial premium over market price in a tender offer for control of a target corporation. See infra notes 102-06 and accompanying text. After obtaining control, the remaining outstanding shares typically sell for substantially more than the market price prevailing prior to the tender offer, though less than the amount offered in the tender offer. See infra note 107 and accompanying text. Assuming this new price plateau is indicative of some lasting and fundamental value the market attaches to a company in the hands of a new controlling shareholder, such plateau will support any future tender offer or merger agreement. Should the acquiring company later decide to acquire the remaining outstanding shares through a negotiated or non-negotiated merger, it may well have to pay a second premium over the then prevailing market price. One commentator reports that among a group of 26 recent negotiated acquisitions of minority shares by controlling shareholders, all but one were at a premium over market value of at least 10%, and 85% were at a premium of at least 35%. Chazen, Fairness from a Financial Point of View in Acquisition of Public Companies: Is “Third-Party Sale Value” the Appropriate Standard?, 36 BUS. LAW. 1439, 1445 n.36 (1981). Reason suggests, then, that in comparison to the cost of two separate transactions, both involving the payment of a premium, an integrated, two-tiered tender offer, which sets the price of the second step merger at the time of the first step tender offer, will succeed at a lower total cost to the acquiring corporation.
Although advantageous for bidders, the two-tiered tender offer has been harshly criticized and has sparked shareholder (and target) litigation. The principal allegation is that the two-tiered offer coerces unwilling target shareholders to tender their shares in the first step (to avoid forced acceptance of the lower valued second step), thereby effectively preventing other potential offerors from bidding for the target.

This Comment will address the various concerns arising from use of the two-tiered tender offer. Part I fully describes the two-tiered offer, using the recent takeover of Marathon Oil Company as an example. This part also identifies the problems encountered in each phase of the transaction and discusses the separate concerns of the acquiring company, the target company, shareholders, and the Securities and Exchange Commission. Part II describes the federal laws governing tender offers and analyzes claims that two-tiered tender offers violate such laws. Although concluding that the two-tiered offer is a permitted acquisition technique, this part offers a proposal for reform to ensure shareholder protection as the technique evolves. Part III discusses shareholders' state law claims and how such laws can be amended to better address this new acquisition technique.

I. THE TWO-TIERED TENDER OFFER

The two-tiered tender offer is a fairly recent development in the mergers and acquisitions field. Thus, it may be helpful to examine in detail the course of one such event. The acquisition of Marathon Oil Company nicely illustrates the intricacies of the two-tiered tender offer as well as the concerns of the acquiring company, competing bidders, target shareholders, and the Securities and Exchange Commission (SEC or Commission).

A. Acquisition of Marathon

The Marathon Oil Company (Marathon), an Ohio corporation, was a widely held public corporation engaged primarily in the production, refining, and marketing of oil products. On October 30, 1981, Mobil Oil Corporation (Mobil) announced an offer to acquire all of the outstanding shares of Marathon. In the first step, Mobil offered to purchase up to 40 million of the then over 58.9 million outstanding shares of Marathon for $85 per share in cash. If it obtained majority

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6 Marathon Oil Co., Proxy Statement 56 (Feb. 8, 1982) [hereinafter cited as Proxy Statement].
7 Id. at 8.
8 Id. at 6.
9 Id. at 8.
control through this first step, Mobil then planned to gain complete control through a second-step merger in which it would exchange debt securities having a market value of $85 for each remaining share of Marathon.\textsuperscript{10} On October 31, 1981, the directors of Marathon determined that the Mobil offer was "grossly inadequate," recommended that the shareholders reject it,\textsuperscript{11} and quickly set out to find other corporations that might be interested in acquiring Marathon. Discussions between Marathon and the United States Steel Corporation (U.S. Steel) began on November 9, 1981, while Mobil's tender offer remained open, and the U.S. Steel offer was accepted by the Marathon directors on November 18, 1981.\textsuperscript{12} The U.S. Steel offer was made public on November 19, 1981.\textsuperscript{13} Determined to provide a superior alternative to Mobil's $85 per share offer, U.S. Steel proposed a two-step, two-tiered offer. In the first step, U.S. Steel offered to pay $125 in cash for each of 30 million (about 51\%) of Marathon's outstanding shares.\textsuperscript{14} In the second step, U.S. Steel proposed to acquire all of the remaining outstanding shares\textsuperscript{15} in a merger between Marathon and a wholly owned subsidiary of U.S. Steel whereby each share of Marathon stock would be exchanged for $100 face value, 12\frac{1}{2}\% , twelve-year debt securities of U.S. Steel,\textsuperscript{16} having a market value of approximately $86\textsuperscript{17} at the time the offer was made.

Despite Mobil's efforts to enjoin U.S. Steel's acquisition of Marathon\textsuperscript{18} and Mobil's subsequent revised offer (which was also in two-tiered form\textsuperscript{19} in response to U.S. Steel's two-tiered offer), over 53 mil-

\begin{footnotes}
\item[10] Id.
\item[11] The several factors which the Marathon directors considered in reaching this conclusion are enumerated in id. at 8.
\item[12] Id. at 9-11.
\item[13] United States Steel Corporation, Offer to Purchase for Cash 30,000,000 Common Shares of Marathon Oil Company at $125 Per Share Net (Nov. 19, 1981) [hereinafter cited as Offer to Purchase].
\item[14] Id. at 1.
\item[15] The remaining outstanding shares included those tendered in the first step but not accepted because the offer was oversubscribed, as well as those not tendered.
\item[16] Offer to Purchase, supra note 13, at 10.
\item[18] As part of the merger agreement between Marathon and U.S. Steel, Marathon granted to U.S. Steel two options aimed at reducing competition over the acquisition of Marathon. Under the agreement, U.S. Steel was granted an option to purchase from Marathon up to ten million Marathon shares for $90 per share, and, more importantly, U.S. Steel was granted an option to purchase Marathon's interest in the Yates oil field for $2.8 billion should another corporation succeed in acquiring more than 50\% of Marathon. Proxy Statement, supra note 6, at 10. These so-called "lock-up" options were invalidated as a manipulative tender offer practice under § 14(e) of the Securities Exchange Act, 15 U.S.C. § 78n(e) (1976). Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981). For further discussion of these lock-up options, see infra notes 60-63 and accompanying text.
\item[19] Proxy Statement, supra note 6, at 8.
\end{footnotes}
lion Marathon shares were tendered to U.S. Steel.\textsuperscript{20} U.S. Steel then purchased 30 million of these shares—the number it sought in the first step of the acquisition—and returned the remaining oversubscribed shares.

Having acquired 51% of the outstanding shares of Marathon, U.S. Steel, as promised in its tender offer announcement,\textsuperscript{21} voted such shares in favor of the proposed second-step merger.\textsuperscript{22} Despite a publicized movement of shareholders against the terms of the merger,\textsuperscript{23} more than the necessary number of remaining Marathon shares voted\textsuperscript{24} along with U.S. Steel to meet the two-thirds majority required to approve the merger.\textsuperscript{25} Thus, to complete the second step of the acquisition, the remaining 49% of Marathon shares were to be exchanged for the debt securities of U.S. Steel.

\section*{B. Aftermath of Marathon and Concerns Raised by Two-Tiered Tender Offers}

To summarize: Mobil's October 30, 1981 tender offer was a two-step, equal consideration proposal, offering $85 of consideration in each step.\textsuperscript{26} U.S. Steel's November 19, 1981 tender offer was a two-step, two-tiered offer, with $125 being offered in the first step and a debt security with a fluctuating market value being offered in the second step.\textsuperscript{27} Mobil's revised offer was also in two-tiered form, with $126 being offered in the first step and a debt security with a market value of $90 being offered in the second step.\textsuperscript{28}

Mobil, in both its initial equal consideration offer and its subsequent revised two-tiered offer, disclosed the market value of its pro-

\begin{footnotes}
\item[21] Offer to Purchase, supra note 13, at 12.
\item[25] OHIO REV. CODE ANN. § 1701.78(F) (Page 1978) (merger into domestic corporation) and § 1701.79(D) (Page Supp. 1981) (merger into foreign corporation). Had Marathon been a Delaware corporation, U.S. Steel's 51% vote would have been sufficient by itself to approve the merger and freeze out all remaining public shareholders. DEL. CODE ANN. tit. 8, § 251(c) (1975) (long form merger requires majority of outstanding stock for approval).
\item[26] See supra text accompanying notes 9-10.
\item[27] See supra text accompanying notes 14-15.
\item[28] See supra text accompanying note 19.
\item[29] Both types of two-step offers—equal consideration and two-tiered—have been described as "integrated," see Brudney & Chirelstein, \textit{A Restatement of Corporate Freezeouts}, 87 YALE L.J. 1354, 1360 (1978) [hereinafter cited as Restatement], or "unitary," see Proxy Statement, supra note 6, at 11 (this terminology was also used in the cover letter to this Proxy Statement), because the terms of acquisition of all shares bought in both steps are embodied in a single plan and are announced in regulated disclosure statements published before any shares are tendered.
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posed second-step debt securities. Mobil assumed the risk of interest rate fluctuations by promising to structure the terms of the debt securities so as to achieve a stated market value.29

U.S. Steel, on the other hand, by shifting the risk of interest rate fluctuation to the Marathon shareholders, could not disclose the market value of its second step debt securities.30 As it happened, rates fluctuated with an adverse effect to shareholders. From the time U.S. Steel announced its offer to the date it issued the debt securities four months later, the market value of the second-step consideration dropped from an estimated value of $8631 to an actual trading value of approximately $78.32

Because of the deal's high stakes and the techniques used to implement it, the takeover of Marathon by U.S. Steel prompted several class action suits by Marathon shareholders.33 The allegations implicated the validity of the two-tiered, two-step takeover tactic, asserting: (a) that the pricing of the second-step consideration amounted to a manipulative act or practice under section 14(e) of the Securities Exchange Act of 1934;34 (b) that U.S. Steel failed to disclose fully and fairly internal valuations of Marathon's assets (including valuations of Marathon's proven, probable, and possible oil reserves);35 and (c) that the second-step merger served no legitimate business purpose, that the terms were not entirely fair to minority shareholders, and that U.S. Steel violated state law fiduciary duties by denying the minority shareholders their right to share proportionately in the true value of Marathon.36 The shareholder actions sought to enjoin or rescind the merger, and asked for compensatory and punitive damages as well as other costs and fees. None of the suits were successful in obtaining a preliminary injunction to block the merger. After the second step merger was approved on March 11, 1982, many of the dissenters invoked their remaining legal

29 See Proxy Statement, supra note 6, at 11.
30 See Offer to Purchase, supra note 13, at 10.
31 See supra note 17 and accompanying text.
32 Wall St. J., Apr. 21, 1982, at 1, col. 6. Interest rates subsequently dropped and the value of U.S. Steel debt securities has risen substantially.
34 Radol v. Thomas, 534 F. Supp. 1302, 1311 (S.D. Ohio 1982); see also Proxy Statement, supra note 6, at 15 (citing claims of manipulative acts raised in Woods v. United States Steel Corp., No. 82-31 (N.D. Ohio filed Jan. 18, 1982)).
36 Id. at 14, 21.
remedy, the state law statutory appraisal proceeding, arguing that they were entitled to fair cash value for their shares, a value exceeding the worth of the U.S. Steel securities offered in the second-step exchange.

The types of charges raised in the Marathon takeover—manipulation, unfairness, coercion—recur frequently in securities litigation and perhaps are even to be expected when a new technique is introduced. However, where new techniques are involved, it is especially important to assess the validity of such charges in the context of both law and policy, and if necessary, to formulate new regulatory safeguards.

II. Do Two-Tiered Offers Violate Federal Law?

A. Federal Regulation of Tender Offers

In the 1960's many corporations embarked on aggressive campaigns to acquire controlling interests in other publicly held corporations. The offeror might acquire the stock of the target company in private transactions, in the open market, or by making a public offer to the shareholders of the target company to tender their shares, either for cash, for securities of the offering corporation, or some combination of the two. These takeover bids were often bitterly contested by the management of the target corporation, and there were claims that shareholders were confused and charged of market manipulation and coercion of shareholders.

When the acquiring corporation offered its own securities in exchange for shares of the target corporation, the securities had to be registered under the Securities Act of 1933 and the solicited shareholders received a prospectus. In the case of cash tender offers, however, there was no requirement for the filing of any solicitation material with the SEC nor the dissemination of such material to target shareholders.

The Williams Act, passed by Congress in 1968, added several new provisions to the 1934 Securities Exchange Act of 1934 to deal with these problems. The Williams Act requires any person making a

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37 In Ohio, appraisal is a judicial determination of the “fair cash value” of the dissenters’ shares one day prior to the merger. OHIO REV. CODE ANN. § 1701.85(C) (Page 1978).
tender offer that would result in his owning more than five percent of a class of registered securities to file with the SEC a statement setting forth (a) the background of such person, (b) the source of the funds used for the acquisition, (c) the purpose of the acquisition, (d) the number of shares owned, and (e) any relevant contracts, arrangements, or understanding with any person with respect to any securities of the target.\textsuperscript{42}

The Williams Act and subsequent amendments also set forth a timetable\textsuperscript{43} regulating most tender offers:

1) Business Day Zero—the filing of the tender offer materials with the SEC by the bidder.

2) Business Day Three—dissemination of bidder's tender offer to target shareholders.\textsuperscript{44}

3) Calendar Day Ten—date on which shareholders' rights to have their tendered shares taken up on a pro rata basis terminate (applies to tender offers for less than all of the shares of the target company).\textsuperscript{45}

4) Business Day Ten—date by which target management must announce its position with respect to the tender offer to target shareholders.\textsuperscript{46}

5) Business Day Fifteen—date on which a shareholder's right to withdraw tendered shares terminates.\textsuperscript{47}

6) Business Day Twenty—minimum required period for the tender offer to remain open.\textsuperscript{48}

In addition, the Williams Act made it unlawful for any person to omit or misstate a material fact, or to engage in any fraudulent, deceptive, or manipulative act, in connection with a tender offer.\textsuperscript{49} This general antifraud provision, as with Rule 10b-5\textsuperscript{50} before it, has been embraced as a tool to attack the substance of tender offers.

\textsuperscript{42} Securities Exchange Act of 1934 §§ 13(d), 13(e), 14(d), 14(e), and 14(f), 15 U.S.C. §§ 78m(d), 78m(e), 78n(d), 78n(e), and 78n(f) (1976).

\textsuperscript{43} The timetable format set forth herein is adapted from \textit{Pozen, Extended Proration Time for Tender Offers Proposed}, Legal Times of Wash., July 12, 1982, at 15, col. 1.


\textsuperscript{47} SEC Rule 14d-7, 17 C.F.R. § 240.14d-7 (1982).


\textsuperscript{50} SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1982).
B. Two-Tiered Offers and Section 14(e)

1. Background

A tender offer remains open for a minimum of twenty business days. Because tender offers are always made at prices above the prevailing market price, there is a financial incentive for target shareholders to tender before this period elapses.

The degree of incentive to tender depends on the structure of the offer. Thus, a shareholder's decision to tender may turn on whether the offer is a partial tender offer for control (with no mention of a second-step merger), a two-step, equal consideration offer in which the cash offered in the first step is substantially equivalent to the value of the securities exchanged in the second-step merger, or a two-step, two-tiered offer in which the consideration paid in the first step is greater than that paid in the second step. Further, each shareholder must decide within a limited time whether to accept the offer or to decline and face the attendant risks.

The shareholder who declines to tender in a partial offer for control (with no mention of a second-step merger) has decided to remain a shareholder of the target corporation, whether because he believes that the offer will trigger higher bids, that the value of the shares will increase beyond the tender price because of the acquiror's reputation, because of inability to understand or evaluate the offer, or for some other reason.

A two-step offer to acquire 100% of the outstanding shares of a target corporation presents much different problems. Confronted with such an offer, the shareholder knows that he will not remain a shareholder for long—he either tenders in the first step or he gets frozen out in the second-step merger. Although equal consideration offers and two-tiered offers are similar in that both look to 100% control of the target, two-tiered offers are more likely to succeed and thus are considered "stronger." In an equal consideration two-step offer, the incentives to tender are: (1) the prospect of earlier receipt of cash for those who partake of the first-step offer; (2) the avoidance of some of the brokerage commissions payable if the target shareholder sells the second-step securities; and (3) fear that the offeror will not have sufficient shares tendered to fulfill its condition for purchase of tendered shares,

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61 See supra note 48 and accompanying text.
65 Fleischer, supra note 1, at 19, col. 4.
resulting in a lost opportunity to realize a tender offer premium. These incentives are also present in two-tiered offers, but, importantly, two-tiered offers provide the additional strong incentive that tendering shareholders will receive greater consideration than nontendering shareholders. In the U.S. Steel offer, tendering Marathon shareholders actually received blended benefits worth $105 per share,\(^{64}\) nontendering shareholders—those who also chose not to sell on the market—received debt securities that have traded at near $78.\(^ {65}\) Thus, a target shareholder confronted with an equal consideration two-step offer—for example, $100 cash for 51% of the outstanding shares, followed by debt securities valued at $100 for the remaining 49%—will have slightly less incentive to tender than he would if confronted by a two-tiered offer—for example, $115 in cash followed by debt securities valued at $85.\(^ {66}\) Nevertheless, both the equal consideration and two-tiered offers have a blended cost of approximately $100 per share to the offeror.

2. Are Two-Tiered Offers Manipulative?

Section 14(e) of the Williams Act declares it unlawful “for any person to make any untrue statement of a material fact or omit to state any material fact . . . or to engage in any fraudulent, deceptive, or manipulative acts . . . in connection with any tender offer.”\(^ {67}\) Invoking this section, Marathon shareholders have attacked the two-tiered tender offer as a “manipulative act” in connection with a tender offer. They have alleged that the two-tiered pricing structure creates “artificial market influences” by coercing target shareholders to tender in order to avoid being frozen out in the second-step, lower priced merger,\(^ {58}\) and argue that a shareholder’s investment decision should be based on the merits of the offer, not result from the coercive nature of the pricing device.\(^ {69}\)

\(^ {64}\) Approximately 90% of the outstanding Marathon shares were tendered in the first step of the offer. U.S. Steel purchased the number of these shares necessary to acquire a 51% controlling interest in Marathon at the $125 per share first-step price. It then purchased the remainder of these tendered shares in the second-step merger for the equivalent of $78 per share. Thus, the blended price received by a Marathon shareholder who tendered his shares in the first step was \(((.51/.90) \times \$125) + ((1 - .51/.90) \times \$78) = \$105\) per share.

\(^ {65}\) See supra note 32 and accompanying text. As interest rates have fallen since March 1982 the market value of the debt securities has substantially increased.

\(^ {66}\) In an equal consideration two-step offer, the offeror would pay \((.51 \times \$100/\text{share}) + (1 - .51 \times \$85/\text{share})\), or an average price of \$100/share. In a two-tiered offer, the offeror would pay \((.49 \times \$115/\text{share}) + (1 - .49 \times \$85/\text{share})\), or an average price of \$100.30/share.


\(^ {69}\) Id. The federal court that heard such allegations by dissident Marathon shareholders has held, however, that those arguments are untenable as a matter of law. Radol v. Thomas, 556 F. Supp. 586 (S.D. Ohio 1983) (order granting in part and denying in part defendants’ motion for
The Marathon shareholders' claim that a tender offer employing two-tiered pricing is manipulative looks for support in the Sixth Circuit Court of Appeals' ruling in Mobil Corp. v. Marathon Oil Co. In that action, Mobil challenged two "lock-up" options granted by Marathon to U.S. Steel in their merger agreement. One option gave U.S. Steel the right to purchase Marathon's crown jewel and biggest asset—in the event that any other bidder was successful in defeating U.S. Steel's bid. The second option granted U.S. Steel the right to purchase up to ten million (17%) of Marathon's authorized shares at an advantageous price of $90 per share.

Taking a broad view of "manipulation" under section 14(e), the court invalidated the two contractual options on the ground that they greatly discouraged other bidders from making an offer for the Marathon shares. The court noted that the interpretation of "manipulation" must remain flexible in light of new techniques which artificially affect securities markets: "The methods and techniques of manipulation are limited only by the ingenuity of man. The aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand."

Target shareholders facing a two-tiered offer thus will point to the expansive interpretation given to "manipulation" in Mobil Corp. v. Marathon Oil Co. when asking a court to invalidate such an offer. As one commentator has stated:

[I]f Mobil v. Marathon is read not as a technical legal decision, but rather as a statement that the federal courts will not tolerate unlimited gamesmanship and tactical maneuvering at the expense of the investing public, one can easily see a similar hostile judicial reaction against two-tiered pricing utilizing the convenient rubric of manipulation for want of something better.
Despite the broad view of "manipulation" found in Marathon, the claim that two-tiered tender offers are per se manipulative faces several problems. First, most courts have interpreted "manipulation" narrowly. Marathon's broad interpretation has not been followed in subsequent cases, primarily because of the Supreme Court's holding in Piper v. Chris-Craft Industries that section 14(e) is solely a disclosure provision and that Congress has not authorized the federal courts to scrutinize the substantive fairness of tender offers when adequate disclosure was made. Further, due to a similarity in language, most courts have interpreted section 14(e) as providing investors in the tender offer context with virtually the same protection that section 10(b) and rule 10b-5 provide in the ordinary purchase and sale of securities. In Santa Fe Industries v. Green, the Supreme Court strictly construed the lan-

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29, 1982, at 31, col. 3. Nathan adds, however, that the Marathon view of § 14(e) is likely to be widely criticized as being erroneous. Id. at 31-32.


68 Id. at 30-31.

69 Id. at 30-31.


Compare the language of § 14(e):

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

with the language of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), which makes it "unlawful for any person, directly or indirectly . . . (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe . . . ." and the language of SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1982), which makes it unlawful for any person, directly or indirectly:

(1) to employ any device, scheme, or artifice to defraud,
(2) to make any untrue statement of a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or
(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of a security.

In Panter v. Marshall Field & Co., 646 F.2d 271, 282 (7th Cir.), cert. denied, 454 U.S. 1092 (1981), the Seventh Circuit noted that the language of § 14(e) and § 10(b) are "coextensive in their antifraud prohibitions, and differ only in their 'in connection with' language" and "are therefore construed in pari materia by the courts."
guage of section 10(b), stating that "non-disclosure is usually essential to the success of a manipulative scheme" and that manipulation "refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." The common holding of Santa Fe and Chris-Craft thus appears to be that there can be no manipulation when there is no deception in the form of inadequate or misleading disclosure. It follows, then, that there should be no per se finding of manipulation in two-tiered tender offers so long as the offeror fully discloses his intention to acquire the target in two steps and at two levels of consideration—that is, where there is no misrepresentation. Indeed, the claim that a two-tiered offer is coercive does not show that it is manipulative; rather, it amply demonstrates that the offeror disclosed the two-tiered structure all too well.

A second problem facing persons invoking Mobil v. Marathon is that the manipulation claim that elicited the Sixth Circuit's broad reading of section 14(e) implicated the two key lock-up options negotiated by Marathon and U.S. Steel, not two-tiered pricing. The court noted that it did "not purport to define a rule of decision for all claims of manipulation under the Williams Act." In fact, the Mobil court did note that shareholders "not tendering their shares to [U.S. Steel would] . . . risk being relegated to the 'back end' of [U.S. Steel's] takeover proposal and [receive] only $90 per share," and nevertheless permitted the offer to proceed.

The third, perhaps most significant, problem is a specific holding that the alleged coercive effect of the two-tiered tender offer is not manipulative per se. In Radol v. Thomas, the case in which the Marathon shareholders sought a preliminary injunction to block the second-step merger between U.S. Steel and Marathon, the court held that there was no showing of a substantial likelihood that the two-tiered, two-step offer was coercive or manipulative in violation of section 14(e), noting that

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71 Id. at 477 (citation omitted).
72 Id. at 476.
75 Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 377 (6th Cir. 1981).
76 Id.
any tender offer is likely to be coercive to some degree. A shareholder is faced with a limited time in which to decide whether to accept the offered price for his shares, usually at a premium over that at which the stock was previously trading, or decline the offer and face the attendant risk. . . . Despite this inherent "coerciveness," Congress has not outlawed tender offers but only sought to regulate them, primarily through mandatory disclosure provisions.\textsuperscript{78}

The \textit{Radol} court also noted that the SEC's rules implicitly permit two-tiered tender offers. Rule 13e-3\textsuperscript{79} prohibits fraudulent, deceptive, or manipulative acts in connection with "going private" transactions (those transactions which cause previously public companies to be held by less than 300 persons or neither to be listed on any national securities exchange nor authorized to be quoted on an inter-dealer quotation system of any registered national securities association) and prescribes filing, disclosure, and dissemination requirements in connection with such transactions. Rule 13e-3 creates an exemption from these filing and disclosure requirements for second-step "clean-up" transactions, such as mergers, that occur within one year of a tender offer, provided that the consideration offered during the second-step merger is equal to the highest consideration offered during the first-step tender offer.\textsuperscript{80}

The court in \textit{Radol} reasoned:

Where this "equal consideration" rule is not met, the "going private" transaction is subject to Rule 13e-3. Rule 13e-3 thus, by negative implication, acknowledges that [two-tiered offers] occur and purports to regulate the second step of such two-tiered transactions. While the Court finds neither the decision in [\textit{Mobil Corp. v. Marathon Oil Co.}] nor the implicit recognition in Rule 13e-3 determinative of the validity of such pricing arrangements under 14(e) or 10(b), they caution against any holding that such arrangements are \textit{per se} manipulative under § 14(e) or § 10(b).\textsuperscript{81}

The decision in \textit{Radol} is not unique.\textsuperscript{82}

\textsuperscript{78}534 F. Supp. at 1312. Although the SEC has never adopted a definition of the term "tender offer," a number of courts have identified a "pressure to sell" as a principal characteristic. E.g., Polinsky v. MCA, Inc., [1982 Transfer Binder] \textit{FED. SEC. L. REP.} (CCH) ¶ 98,761, at 93,854 (9th Cir. July 8, 1982); Crane Co. v. Harco Corp., 511 F. Supp. 294, 302-03 (D. Del. 1981); Wellman v. Dickinson, 475 F. Supp. 783, 823-25 (S.D.N.Y. 1979), aff'd, 682 F.2d 355 (2d Cir. 1982).

\textsuperscript{79}17 C.F.R. § 240.13e-3 (1982).

\textsuperscript{80}SEC Rule 13e-3(g), 17 C.F.R. § 240.13e-3(g) (1982).

\textsuperscript{81}Radol v. Thomas, 534 F. Supp. at 1312 (footnote omitted).

\textsuperscript{82}Relying significantly on \textit{Radol}, another court has rejected a similar argument that two-
Further evidence that the SEC tacitly accepts two-tiered offers has been its specific refusal to prohibit such transactions. The SEC has considered and rejected a rule that would have given an opportunity to receive equal consideration to shareholders still owning securities after a "going private" transaction. Although this differs from the context of outside tender offers, it does indicate an unwillingness to require equal consideration generally. The SEC has also issued a series of No-Action Letters in response to proposed acquisitions involving two-tiered pricing.

*Mobil v. Marathon* notwithstanding, it seems clear that two-tiered tender offers should not be found manipulative *per se*. This is not to suggest, however, that all two-tiered offers will avoid a finding of manipulation. A hostile judicial reaction could conceivably result from a fact situation in which (1) a surprise partial tender offer was structured in two widely disparate pricing tiers with a first-step cash offer at a substantial premium over the pre-offer market value and second-step consideration below the pre-offer market value, (2) the low second-step consideration effectively acted as a ceiling or cap on the market price of the target stock during the interim between the first and second steps so as to prevent holders of unpurchased shares from realizing the post-offer market price that otherwise would have prevailed, and (3) the applicable state appraisal statute defines the pre-merger market price—the price that is artificially prevented from rising by the announcement of the inordinately low second-step merger consideration—as a fair price for dissenting shareholders.


For a discussion of the market reaction to tender offers, see *infra* notes 102-14 and accompanying text.

For a discussion of existing appraisal statutes and proposed reforms, see *infra* notes 156-78 and accompanying text.

For example, assume XYZ stock is selling for $75 per share when a two-tiered bid is announced offering $100 per share for 51% of the shares in the first step and $50 per share for the remainder in the second-step merger. The harshest result would occur if exactly 51% of the shares were tendered during the first step. All of these shares would be taken up at $100 per share. Assuming 51% control would give the offeror sufficient voting power to push through the second-step merger (if, for example, the target were a Delaware corporation, *see supra* note 25), the remaining 49% of the shares would be taken up at $50 per share, far below the pre-offer market value. The effect on those shares not tendered in the first step is even more striking because the announced $50 second-step consideration will act as a ceiling should any such shares be sold in the
Such a scenario could validate the concern expressed in *Mobil v. Marathon* regarding practices that impose "an artificial ceiling on the price of [target] shares" and that effectively deter other, potentially more lucrative, bids.\(^8\) In fact, in upholding U.S. Steel's two-tiered offer, the court in *Radol v. Thomas*\(^9\) noted that U.S. Steel's second-step consideration "offered Marathon shareholders a substantial premium over the prices [at] which Marathon shares had been trading,"\(^9\) implying that the court may have been less willing to approve the two-tiered offer had the second-step consideration been significantly lower than the market price for Marathon shares prevailing before the two-tiered offer was announced.

Although situations may exist in which "manipulation" does in fact occur, that possibility hardly justifies the imposition of a *per se* prohibition against two-tiered offers. Given the Supreme Court's narrow view of "manipulation" and the SEC's hands-off attitude, courts need to proceed carefully to avoid tipping the scales in favor of the target while ostensibly protecting unsophisticated investors. As the *Radol v. Thomas* court indicated, shareholders may actually benefit from the two-tiered structure: instead of capping market prices, U.S. Steel's two-tiered offer caused Mobil to raise its overall price per share offer.\(^9\) Such manipulation is not the type contemplated in section 14(e).

### C. The Coercive Effect of Two-Tiered Offers

Closely related to claims of manipulation are those assailing the inherently coercive nature of the two-tier structure. In essence, these claims force courts to consider the validity of the two-tiered offer within the general federal regulatory framework.

#### 1. The Equal Consideration Argument

Two noted commentators, Victor Brudney and Marvin Chirelstein, concluding that two-tiered tender offers are coercive and unfairly penalize those shareholders who would prefer to hold their shares,\(^9\) market. Further, even if holders of shares not taken in the first step dissent, state appraisal statutes may value their rights on the basis of the pre-merger market price—i.e., $50.

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\(^8\) See supra notes 77-81 and accompanying text.

\(^9\) 669 F.2d at 377.


\(^9\) Id. at 1313.

\(^9\) Given the inability of [a target's] dispersed stockholders to communicate with one another during the tender, the act of offering a higher price on tender than would be paid on merger would have a "whipsaw" effect on [the target's] stockholders. Individual stockholders would find it difficult or impossible to refuse a tender price...
advocate a rule requiring that the same price per share be paid in both steps of the two-tiered offer.\textsuperscript{93}

It is not simply "coercion" that Brudney and Chirelstein perceive as the vice of two-tiered pricing. To the contrary, they admit that freezeouts, "by definition, are coercive: minority stockholders are bound by majority rule. . . . But this alone does not render freezeouts objectionable. Majority rule always entails coercion."\textsuperscript{94} The authors adopt the view, however, that majority rule is an "acceptable rule of governance [only] if all members of the voting constituency . . . will be identically affected by the outcome of the vote."\textsuperscript{95} The authors point out that two-tiered pricing denies the nontendering minority any pro rata share of the acquisition premium that is an implicit part of the first-step cash offer. This unequal treatment of the minority is, in their view, unfair.\textsuperscript{96} The fallacy in the authors' reasoning is their implicit assumption that there is a reasonable expectation that would support a legal requirement that equal treatment be accorded to all shares, as distinct from equal opportunity for all shareholders.

Equal treatment of shares is a policy restricted in application to the tendering portion of a two-step acquisition. Section 14(d)(7) of the Williams Act "was intended to ensure the equal treatment of all shareholders who tender to a bidder and has been administered by the Commission in a manner intended to achieve that purpose."\textsuperscript{97} The section requires that "when a bidder increases the amount of consideration offered [in the tender offer], the higher consideration [must] be paid to all shareholders, including those who tendered prior to the increase."\textsuperscript{98} On
its face, that requirement applies only to shares tendered and does not affect the value exchanged in the second-step merger. Further, as discussed earlier, the federal tender offer rules implicitly permit two-tiered tender offers.99

Because there can be no examination of the substantive fairness of tender offers under federal law,100 the equal treatment argument's only chance of success rests on whether adverse market behavior is proven.101 An examination of market reaction to analogous partial tender offers for control102 may be helpful in determining whether an equal consideration rule should be adopted for two-step offers for 100% control.103 A detailed empirical study of 258 partial tender offers for control made between 1962 and 1977, performed by Michael Bradley, provides a good basis for this examination.104

Bradley's statistical composite of 161 successful single-step offers reveals the following composite picture. Target stock that traded at an index price of 100, two months prior to a tender offer, gradually increased in value to 119 as rumors or inside transactions influenced the market. The statistically typical target then elicited a tender offer of 149. Thus, Bradley found that the average control premium was 49% over the market price of 100 that had prevailed prior to the price rise to 119 in anticipation of the offer.105 The average tender offer premium was 25% over the market price (i.e., 119) that prevailed on the day prior to the offer.106 The important conclusion for the purpose of this Comment, however, is that some time after the purchase of tendered shares, the minority noncontrol shares traded for 136, 13 index points

99 See supra text accompanying notes 76-81. Even the proposed but unimplemented "best price rule," proposed rule 14e-4, SEC Exchange Act Release No. 16385, 44 Fed. Reg. 70,349, 70,355-56 (1979), requiring offerers to pay all tendering shareholders the highest amount of consideration offered to any of them, again is only applicable to the first-step tender offer and not to the consideration of the second-step merger. For a thorough analysis of pre- and post-1980 proposed and final tender offer rules, see Nathan & Volk, Developments in Acquisitions and Acquisition Techniques Under the Williams Act, in PRACTISING LAW INSTITUTE, TWELFTH ANNUAL INSTITUTE ON SECURITIES REGULATION 159 (1981).


101 See supra text accompanying notes 88-90.

102 A partial tender offer for control is a single-step tender offer for less than 100% of the target company's shares which, if successful, will give the offeror effective control of the corporation. For purposes of this discussion, it is assumed that the offeror in such a partial tender offer makes no mention of a second-step merger.

103 Partial tender offers for control have, on occasion, directly competed with two-step offers for 100% control. An example is the Seagram offer for as much as 51% of Conoco shares in which the Du Pont two-tiered, two-step offer for 100% of the common stock finally prevailed. See E.I. Du Pont de Nemours and Company, Proxy Statement 12-14 (July 20, 1981).


105 Id. at 345-46, 362 (fig. #2).

106 See id. at 362-63 (figs. #1 & #2).
less than the price paid in the tender offer.\textsuperscript{107} Thus, target shareholders who fail to tender to a partial (one-step) tender offer should expect to receive less than the tender offer price if they later decide to sell their shares in the market. This finding supports the conclusion that two-step tender offers for 100\% control should not need to provide equal consideration in both steps—indeed, that the offer should be permitted to be structured in two tiers so as to follow the natural market reaction.

Bradley’s findings support his conclusion that “stockholders respond rationally” to tender offers.\textsuperscript{108} According to Bradley’s analysis, the target shareholder rationally considers a blended average of the tender offer price and the expected subsequent post-offer market value.\textsuperscript{109} Even though Bradley considers only single-step offers, his calculations are comparable to the calculation that a rational shareholder confronted with an integrated two-step offer might carry out. Such a shareholder rationally would consider the blended average of the first-step and second-step consideration.

A shareholder, according to this analysis, would have tendered all of his shares to the previously described statistically typical offer priced at 149, precisely because the shareholder would have anticipated that he would have no better market opportunity after the expiration of the tender offer. All other shareholders would, in this theoretical model, have also acted on the same expectation of a greater premium for shares in the tender offer than in the post-tender-offer trading market.\textsuperscript{110} If the typical partial offer was structured to purchase, say, 51\% of outstanding shares, and all shareholders tendered, 49\% of each shareholder’s tendered block would be returned. Each shareholder would then have the opportunity to sell his remaining shares in the market for cash. The combined average amount realized from both steps would be $143/share.\textsuperscript{111} That financial outcome, therefore, is comparable to a two-step, two-tiered takeover with a first-step cash offer for 51\% of shares at 149, and securities in the second-step merger with a market value of 136. The financial result for the shareholder would also be comparable to an equal consideration two-step acquisition with a partial cash offer of 143 and with securities in the second-step merger that also command a market value of 143. As discussed

\textsuperscript{107} Id. at 346-47, 362-65.
\textsuperscript{108} Id. at 365.
\textsuperscript{109} Id. at 352-53.
\textsuperscript{110} Id. at 353-55.
\textsuperscript{111} Id. at 353 (applying equation (1)). The average price of $143/share is arrived at as follows: 51\% of all shares are purchased in the tender at $149/share and the remaining 49\% of the shares are sold in the market at the post-tender market price of $136/share. Thus, $(.51 \times 149) + (.49 \times 136) = 143.$
earlier, however, the practical weakness of the equal consideration two-step offer is that it gives many shareholders too little incentive to tender.

It is clear that the acquisition premium inherent either in a partial offer or in the first step of a two-tiered offer creates an incentive or pressure to tender. The courts take the position, however, that "pressure on stockholders to decide whether to sell is the primary characteristic of a tender offer." Thus, it should make no difference whether that pressure derives from the price spread between a partial (one-step) offer and the expected post-offer market, or from the spread between the first- and second-step consideration in a two-tiered offer; it would not be sound policy to attempt to eliminate the source of the pressure in either case.

One could argue that there is potential for much greater pressure to tender in a two-tiered offer as opposed to a partial tender offer—if, for example, the second-step consideration were structured at a value much lower than the post-offer market would value target shares after a partial tender offer. The appropriate legal response, however, is not to require equal consideration in both steps, but rather to focus on the fairness of the second-step consideration and determine what reforms in the appraisal remedy are needed in the context of two-tiered offers. The potential for an unfair second-step price present in two-tiered offers but not present in the partial tender offers studied by Bradley does not invalidate the analytic comparison of partial and two-tiered offers provided there is an acceptable appraisal remedy for unfair second-step consideration. Proposals for reform of present appraisal remedies to address this problem are discussed later in this Comment.

2. The Stampeding Effect of Section 14(d)(6)

As noted above, the incentive to tender in a two-tiered offer is more compelling than it is in a two-step, equal consideration offer because only in the former will tendering shareholders receive greater consideration than nontendering shareholders. Prior to the recent adoption of SEC Rule 14d-8, shareholders subject to a two-tiered offer were pressured to tender quickly because only those shareholders who

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112 See supra text accompanying notes 53-56.
114 See infra notes 165-78 and accompanying text.
115 See supra text accompanying notes 53-55.
tendered within the first ten days of the offer were assured that some or all of their shares would be purchased at the higher first-step price. Section 14(d)(6) of the Securities Exchange Act provides that when an offer is made for less than all of the outstanding shares of the target corporation, the offeror must purchase the shares tendered within the first ten calendar days on a pro rata basis. Thus, if a bidder offered to buy 51% of the target company's shares, and 100% of such shares were tendered within ten days of the offer, the bidder must purchase 51% of each shareholder's shares. If only 51% of the shares were tendered within the first ten days, the offeror could purchase all of these shares at the higher first-step price and then reject any shares tendered thereafter, thus relegating such shares to the lower second-step merger price.

Bidders recently have taken advantage of the acute pressure to tender caused by the combination of the two-tiered offer and the ten-day proration period. As stated by one commentator,

a two-tiered pricing structure has the advantage of ensuring a high percentage of tenders during the proration period, since the target shareholders know (or should know) that if they do not tender within the proration period they will almost inevitably be relegated to the "low back end" of the second step merger. Coupled with a 10-calendar-day proration period (the shortest possible under section 14(d)(6) of the exchange act), the two-tiered pricing structure can, and is intended to, create an atmosphere of stampede among the target company's shareholders.

117 By definition, the first step in a two-step acquisition is always an offer for less than all of the outstanding shares of the target.


119 Assume, for example, that XYZ stock is trading for $75 per share. If a two-tiered offer were made, offering $115 in the first step for 51% control and $85 in the second step for the remainder, target shareholders would seek to maximize the number of their shares taken in the first step. They would thus tender within the ten-day proration deadline. Since it is highly unlikely that 100% of the outstanding shares would be tendered, see Radol v. Thomas, 534 F. Supp. 1302, 1305 (S.D. Ohio 1982) (even though U.S. Steel was certain to succeed, only about 90% of the shares were tendered during the time the proration pool remained open), each shareholder who does tender will have more than 51% of his shares purchased at the higher first-step price. If, however, an equal consideration offer were made, offering $100 in the first step for 51% control and $100 in the second step for the remainder, "small" shareholders may decide not to tender. Although they may believe that $100 is a fair price, such shareholders may reason that their tender would have virtually no effect on the success of the offer and that they will receive $100 whether they tender in the first step or wait to get frozen out in the second step. Such shareholders lose nothing by holding their shares, but gain a possible opportunity to sell if the market trading price, by happenstance, jumps above $100.

120 See supra note 1.

121 Nathan, supra note 65, at 31, col. 1. See also Fleischer, supra note 1, at 19, col. 3, who states:
Although the stampeding effect was a welcome phenomenon from the bidder's point of view, it pressured target shareholders into tendering their shares without sufficient information to make a sophisticated investment decision. First, target management is not required to announce its position with respect to the tender offer until the tenth business day following the commencement of the offer, 122 which is several days after the tenth-calendar-day proration deadline. Second, many target shareholders do not receive the bidder's tender offer materials until several days into the ten-calendar-day proration period or later, 123 giving such shareholders little or no time to digest the information and tender within the proration deadline. Third, while arbitrageurs and institutional investors have the resources and sophistication to obtain the tender offer materials on the first day of the offer and to arrange for prompt delivery of tendered shares to the bidder's depository, more unsophisticated shareholders, whose shares are often held in street name or by nominees, will find it difficult to deliver their shares within the ten-calendar-day deadline. 124

3. The New Proration Rule and a Suggested Alternative

The stampeding effect caused by the combination of the two-tiered tender offer and the ten-calendar-day proration period received much criticism and prompted the SEC to solicit proposals for reform. 125

It became clear that the most effective way to eliminate the stampeding effect was to extend the proration period beyond ten calendar days. On December 28, 1982, the Securities and Exchange Commission put into effect a rule adopting just such a solution. Amended rule 14d-8 126 now requires a bidder in an offer for less than all of the target's shares to purchase on a pro rata basis all shares tendered during the entire period the offer remains open: a minimum of twenty business days. The rule is aimed at eliminating both the coercive atmosphere resulting from and the advantages given to sophisticated investors by the ten-day proration period, a situation notably exacerbated by the

[A] partial bid creates a drive for stock to be tendered within 10 calendar days because tenders within that period are in a preferred pool for acceptance by the bidder. The pressure is more acute in a front-end loaded deal, because, if a shareholder misses the proration pool, his shares will be purchased at the lower second-step price.

122 SEC Rule 14e-2(a), 17 C.F.R. § 240.14e-2(a) (1982). Of course, there is nothing to prevent target management from announcing its position at an earlier date.
advent of the two-tiered tender offer.

Although rule 14d-8 eliminates much of the confusion experienced by less informed investors and goes a long way toward curing the stampeding effect of two-tiered offers, there is a serious question as to whether the SEC exceeded its authority in adopting it. First, it is not clear that the SEC had the power to adopt rule 14d-8. In enacting the Williams Act in 1968, Congress, despite the SEC's request, refused to grant the SEC rulemaking power under section 14(d)(6) to alter the ten-day proration period.\textsuperscript{127} Eager to have the Williams Act passed, the SEC was willing to accept a denial of rulemaking power with respect to section 14(d)(6), asserting that it would go back to Congress should serious problems later arise.\textsuperscript{128} Rather than go back to Congress, however, the SEC sidestepped the limit on its authority under section 14(d)(6), and adopted rule 14d-8 under the rulemaking authority granted under section 14(e).\textsuperscript{129}

Section 14(e), which makes it unlawful for any person to engage in fraudulent, deceptive, or manipulative acts in connection with a tender offer,\textsuperscript{130} was amended in 1970 to give the SEC rulemaking power to prescribe means reasonably designed to prevent such acts.\textsuperscript{131} The amendment was deemed necessary to allow the SEC to "deal more adequately with the sophisticated devices sometimes employed by both

\textsuperscript{127} \textit{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. 39, 191 (1967) (statements of Manuel F. Cohen, Chairman, SEC) [hereinafter cited as \textit{Senate Hearings}].

\textsuperscript{128} Compare, for example, \textit{Securities Exchange Act of 1934} § 14(d)(5), 15 U.S.C. § 78n(d)(1) (1976), which permits tendered shares to be withdrawn within the first seven calendar days after the offer was made. The SEC, in rule 14d-7, 17 C.F.R. § 240.14d-7, extended the withdrawal period to fifteen business days. Unlike the case of § 14(d)(6), Congress granted the SEC rulemaking authority in § 14(d)(5) to amend the law to protect investors.

\textsuperscript{129} The House bill extended proration for the duration of the tender offer and conferred rulemaking power in the Commission to change the proration period if it believed a shorter period to be in the public interest. The Senate bill required proration only during the first ten days of the offer and conferred no rulemaking power on the Commission to change it. Commenting on these two bills, the Commission stated:

\begin{quote}
while . . . we prefer the provisions of the House bill to those of the Senate bill, insofar as the two differ, we regard these points as of lesser significance compared with the importance of enacting this needed legislation at this session of Congress. If this committee accepts the Senate version, we believe we could live with it. If experience demonstrated that there were serious problems, we could and would come back to you.
\end{quote}


\textsuperscript{130} \textit{SEC Exchange Act Release No. 19336, supra note 125.}

\textsuperscript{131} \textit{See supra notes 57-90 and accompanying text.}

sides in contested tender offers." There is, however, nothing in the legislative history of section 14(e) to indicate that Congress intended to permit the SEC to alter the force or effect of section 14(d)(6) or any other unambiguous language found in the securities laws. Thus, there is doubt as to whether the SEC's rulemaking authority under section 14(e) is broad enough to extend the ten-day proration period of section 14(d)(6).

Second, even assuming the SEC has the authority under section 14(e) to adopt rules which affect other sections of the Exchange Act, it is not clear that it can adopt a rule such as 14d-8, which directly contravenes the statutory language of section 14(d)(6). As SEC Commissioner Shad noted in his dissent from the adoption of rule 14d-8, the Supreme Court has held that where congressional language is unambiguous, there is no power to amend it by regulation. It is difficult to find language more clear on its face than that of section 14(d)(6), which provides that where more shares are tendered "within ten days after . . . the offer [is made] than [the offeror] is . . . willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata . . . ."

Third, the legislative history of section 14(d)(6) shows that Congress considered and rejected a rule requiring proration for the entire period of the tender offer. As originally proposed in 1967, the bill that ultimately became the Williams Act required proration for the entire period a tender offer was to remain open. Congress, however, persuaded by several commentators, determined that such a proposal could unduly favor target management in its effort to frustrate a takeover attempt. As stated by one Senate witness:

[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 management an unfair time advantage for launching the powerful counteroffensive moves which are available to it.

The point here is that there are a number of moves

which management can take, once it is aware of the bid. These moves take time to launch, to get set. And the longer a period of time they have to do this before investors have to irrevocably commit their shares, the more chance they have of defeating the bid.\(^3\)

Relying on testimony such as the above,\(^3\) Congress in 1968 expressly rejected a rule essentially identical to rule 14d-8—a rule requiring proration for the entire period of the tender offer.\(^3\) By ignoring this rather clear legislative history, the SEC may have undercut fatally the validity of its new rule.

Although any variation of the statutory ten-day-proration period might fall if challenged, an alternative rule that increases the proration period from the present ten calendar days to fifteen business days could better face the legal barrier posed by the legislative history of section 14(d)(6).\(^4\) First, this proposal provides target shareholders with sufficient time to make informed investment decisions without giving target management an undue amount of time to mount a counteroffensive.\(^4\)

The proposal thus better achieves the delicate balance Congress intended by enacting the Williams Act: namely, that any rule changes

\(^3\) Senate Hearings, supra note 127, at 59 (statement of Professor Samuel L. Hayes).

\(^3\) See also id. at 77 ("The difficulty with the pro rata method when employed for a longer period results in part from the fact that the offeror cannot determine the percentage of shares which it will purchase until the total number of shares tendered has been ascertained at the expiration of the offer.") (statement of Donald L. Calvin); id. at 108 ("[W]e believe it advisable to limit the period in which the takeup is pro rata in order to conform to existing [New York Stock Exchange] practices providing for an initial pro rata period followed by a first-come, first-serve period of takeups so that depositors will more quickly know their position in respect to the tender offer and so as to prevent volume tenders at the close of the offering.") (statement of Robert W. Haack).

\(^4\) Such a rule was suggested by Pozen, supra note 124, at 15, col. 2.

\(^4\) Given a great deal of time, target management can often use its great resources and influential position with target shareholders to defeat a tender offer:

Management’s record [of defeating cash tender offers] can probably be attributed to the numerous advantages it has in combatting a tender offer. Management has the resources of the corporation at its disposal to defend against what it will characterize as a dangerous threat to existing corporate policy. It can communicate its opposition to the shareholders by letter or advertisement. Since it possesses the shareholder list, it knows which shareholders hold large blocks of stock and should be wooed individually. It may have strong allies—banks with which the corporation keeps deposits, insurance companies with which it places business, suppliers, and customers. The banks might withhold financing needed by the offeror. The other allies might buy stock in the market and thus push up the price. Any of them might be helpful in keeping stock from being tendered. The corporation itself might buy some stock or raise its dividend—both of which may have the effect of increasing the price of the stock. Other techniques used to defend against tender offers includes [sic] attempts to arrange mergers with other companies, or attempts to block the acquisition on the ground that it would violate the antitrust laws or some other regulatory statute.

\(^4\) Senate Hearings, supra note 127, at 137 (statement of Robert H. Mundheim).
favor neither the bidder nor the target.142

Second, this alternative proposal has the withdrawal period and the proration period end at the same time—at the end of the fifteenth business day following the commencement of a tender offer. The SEC has determined that a fifteen-day withdrawal period143 enables a shareholder to make and effect an informed investment decision. If fifteen business days is deemed sufficient time to exercise withdrawal rights, there is no apparent reason why shareholders need proration rights after that time. Moreover, a rule which pegs the termination of proration rights on the same day as the termination of withdrawal rights would alleviate some of the shareholder confusion surrounding the various dates affecting tender offers.

A final advantage enjoyed by the fifteen-day proration period is that, unlike rule 14d-8, it has not been rejected by Congress.144 That fact, in conjunction with the alternative proposal’s substantive benefits, would enable it to better withstand judicial scrutiny.

In view of the potentially destructive stampede effect brought on by two-tiered tender offers, something like rule 14d-8 is necessary. Giving shareholders sufficient time to make informed investment decisions will alleviate problems of the sort contemplated by Congress when it passed the Williams Act. Because the current regulatory framework can resolve satisfactorily the major investor concern with two-tiered tender offers—lack of time—there is hardly a need to forbid such offers out of hand. To do so would be to subvert the essentially neutral stance of the Williams Act with regard to corporate takeovers.

III. RELIEF UNDER STATE LAW

A. Fiduciary Duty and the Entire Fairness Argument

Persons challenging two-tiered offers are not limited to claims under federal law; they may also look to state law for redress. Although

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142 It is clear that the Williams Act was intended to favor neither side in control contests. Senator Williams stated that the purpose of the bill was to protect investors without encouraging or discouraging tender offers: “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.” 113 CONG. REC. 24,664 (1967). See also Edgar v. MITE Corp., 102 S. Ct. 2629, 2636 (1982); Piper v. Chris-Craft Indus., 430 U.S. 1, 31 (1977); Senate Hearings, supra note 127, at 3.

143 SEC Rule 14d-7, 17 C.F.R. § 240.14d-7(a) (1982). The bidder’s tender offer materials must be disseminated to target shareholders by business day three, SEC Rule 14d-5(b)(3), 17 C.F.R. § 240.14d-5(b)(3) (1982), and target management must disseminate its reply by business day ten. SEC Rule 14e-2, 17 C.F.R. § 240.14e-2 (1982). See supra notes 44-48 and accompanying text. Thus, by business day fifteen, the target shareholders have had adequate time to review and digest the offer and to make an informed investment decision.

144 See supra notes 136-38 and accompanying text.
outright state regulation of tender offers has been restricted sharply by the Supreme Court’s decision in Edgar v. MITE Corp., the common law of fiduciary duty remains useful in channeling corporate behavior.

Shareholders owning enough stock to control a corporation, or those who actually control a corporation, owe a fiduciary duty to the remaining shareholders to safeguard their interests and treat them fairly. Where controlling shareholders are corporations that acquired control through tender offers, the fiduciary duty owed nontendering shareholders presents analytical difficulties when that duty is invoked to block second-step mergers.

In Singer v. Magnavox Co., North American Phillips Corporation sought to acquire all the shares of Magnavox in a two-step offer. North American announced its intention to acquire the entire equity interest in Magnavox, and, contingent on the number of shares acquired through the first-step tender, noted that it would resort to a second-step merger or similar transaction to acquire the remaining shares. North American acquired roughly eighty-four percent of Magnavox in the first step and the remaining sixteen percent was absorbed eight months later in a second-step merger. Although the consideration paid was the same in both steps, dissenting shareholders sought to enjoin the merger. Finding for the shareholders, the Supreme Court of Delaware rejected the argument that appraisal was the sole remedy for dissenting stockholders and declared that a merger effected "for the sole purpose of freezing out minority stockholders . . . [is a] violation of a fiduciary duty for which the Court may grant . . . relief." This fiduciary duty, owed by North American as majority stockholder to the minority, could be discharged only if there was a "business purpose" for the merger independent of the freezeout, and, even if such a "business purpose" were demonstrated, the merger had to be "entirely fair."
to the minority shareholders. 180

For purposes of recognizing a fiduciary duty, a merger that represents the second step of a single plan to gain complete control of a target should be distinguished from mergers of long-held affiliates. In the latter case there has been a long-term relationship between the two firms, with one managing or controlling the other, and the fiduciary relationship is especially important because it has developed over time: the minority has in fact relied on the majority and maintains an expectation of fairness. Contrarily, the second step of a unitary plan to acquire a target cannot be viewed as a transaction between related parties, and thus no fiduciary duty should be recognized. 181 At the announcement of a two-step tender offer, the bidding corporation is an unrelated outsider—it is in an adversarial relationship to the shareholders of the target corporation. The only duty it owes at this point is to its own shareholders to acquire the target as cheaply as possible. It would be anomalous to hold that at the completion of the first-step tender, and prior to the second-step merger, the acquiring corporation suddenly owes a fiduciary duty to its former adversaries at the expense of its own shareholders.

The inapplicability of Singer's "business purpose" and "entire fairness" tests in the context of two-step acquisition has been noted by commentators. 182 Since it is the "business purpose" of the parent or acquiring corporation that is at issue, 183 such "business purpose" should be deemed inherent in two-step acquisitions—"[t]akeovers by outsiders must be assumed to have a commercial goal that suffices by itself to justify the transaction." 184 Further, in arguing against the applicability of "entire fairness" scrutiny, Brudney and Chirelstein persuasively assert that:

[quote obviously ... the two steps in the acquisition—tender offer plus merger—are integrated and represent a "plan." The analogy to a unitary purchase of assets is close and compelling ... Although the tag-end merger ap-
pears to be an example of self-dealing by the majority stockholders, it is only superficially of that class. Realistically, the tender-plus-merger procedure is merely a way of bypassing the target company's proxy machinery, which is controlled by the incumbent board, and submitting the acquisition proposal to direct referendum of the stockholders. . . . [T]he subsequent merger merely gives effect to the majority's decision to accept the terms of the acquisition [described in the tender offer announcement]. . . .

In these circumstances, there really is no transaction between related parties and no self-dealing whatever. The acquiring company should be seen as an unrelated outsider throughout the takeover—from the time the tender offer is made to the time the merger is concluded. It has, or should be held to have, no fiduciary obligation as such . . . . It has no obligation to set a "fair" price for the target's property and should have no duty to disclose its management plans or to reveal any other values that it has discovered as an outsider.165

B. Availability of Fair Appraisal Rights

1. The Problem with Existing Appraisal Statutes

It is conceded that two-tiered deals can be structured with a back end so low as to be inherently unfair.166 The answer to this problem, however, is not to regulate two-tiered deals out of existence; it is, rather, to give target shareholders a remedy that will discourage offerors from employing two-tiered offers in an abusive form. Because no other federal or state remedies are available, shareholders must look to their remaining remedy—statutory appraisal rights—when they are faced with second-step consideration they deem unfair.

Appraisal rights provide shareholders dissenting from a merger decision with the opportunity to receive a cash payment from the merged company equal to the "fair value" of their shares.167 Appraisal statutes, however, have been attacked as difficult to apply and unresponsive to new forms of corporate transactions. The procedural requirements necessary to comply with state appraisal statutes,168 the

165 Id. at 1360-61.
166 See supra text accompanying notes 85-90.
168 Under Delaware law, for example, before a dissenting shareholder is entitled to receive
burden of going through the appraisal process, and the difficulty in determining "fair value" have led the appraisal remedy to be described as "technical . . . expensive . . . uncertain in result, and, in the case of a publicly held corporation . . . unlikely to produce a better result than could have obtained on the market. . . . It is, in short, a remedy of desperation. . . ." These factors even discouraged some of the most sophisticated shareholders of Marathon from pursuing their appraisal rights under Ohio law.\footnote{160}

To provide a meaningful remedy, appraisal statutes must become both more responsive to emerging new forms of corporate transactions and easier for shareholders to invoke. This is especially true in the case of a merger that forms the second step of a two-tiered deal. Appraisal statutes often provide that "fair value" is to be determined "exclusive of any element of value arising from the accomplishment or expectation of the merger."\footnote{161} In addition, although fair value of the shares is often determined by taking a weighted average of their market value, investment value, and net asset value, market value is the primary factor if there has been an active market in the acquired shares, sometimes to the complete exclusion of the other two factors.\footnote{162} Some states go so

the cash provided under the appraisal statute, he must (a) file a written objection to the merger prior to the shareholder meeting, (b) vote against the merger, (c) after the shareholder meeting promptly give written notice to the corporation of his intent to pursue his appraisal remedy, and (d) surrender his shares to the corporation. \textit{DEL. CODE ANN. tit. 8, § 262(a)-(i) (Cum. Supp. 1982)}.\footnote{159}

\textit{Eisenberg, The Legal Roles of Shareholders and Management in Modern Corporate Decision Making}, 57 \textit{CALIF. L. REV.} 1, 85 (1969).\footnote{160}

After reportedly taking a position against the merger with U.S. Steel in order to preserve its appraisal rights, Morgan Guaranty Trust, the sixth largest shareholder of Marathon, abandoned that position in view of the complexity of the appraisal process. Prudential Insurance Company, the fourth largest shareholder of Marathon, also considered pursuing its appraisal rights, "but after studying Ohio's complex appraisal process, Prudential came to the same conclusions as Morgan. . . ." \textit{Garson & Tyson, Morgan, Pru Switch on Marathon; Both Now Favor U.S. Steel Merger}, \textit{Am. Banker}, March 11, 1982, at 10, col. 1.\footnote{161}

\textit{DEL. CODE ANN. tit. 8, § 262(h) (Cum. Supp. 1982). See also OHIO REV. CODE ANN. § 1701.85(C) (Page 1978) ("In computing such fair cash value, any appreciation or depreciation in market value resulting from the proposal submitted to the directors or to the shareholders shall be excluded")}.\footnote{162}

\textit{See Chazen, Fairness from a Financial Point of View in Acquisitions of Public Companies: Is "Third-Party Sale Value" the Appropriate Standard?}, 36 \textit{BUS. LAW.} 1439, 1444 (1981). If the market value is unreliable, the courts will give substantial weight to investment value, which is obtained by capitalizing the company's earnings at the rate prevailing in the market for similar companies. Net asset value is usually an important factor only in valuing corporations such as natural resource and real estate companies, which are sometimes thought to be undervalued by the stock market because they produce low reported earnings relative to their cash flow. \textit{Id.}

A major argument of Marathon shareholders was their assertion that the $276 to $323 per share net asset value of petroleum reserves, according to estimates in the Marathon Proxy Statement, \textit{supra} note 6, at 13, should be weighted heavily in determining "fair cash value." \textit{Wall St. J.}, Feb. 17, 1982, at 2, col. 3. A recent Delaware case held that net assets of natural resource companies may be a factor to the extent those assets are held for appreciation and not merely as raw material to produce a stream of future production earnings. \textit{Bell v. Kirby Lumber Corp.}, 413 A.2d 137 (Del. 1980).
far as to make market value the conclusive test of value and eliminate appraisal rights where the stock has a public market. Further, states often provide that fair value is to be measured as of the day immediately preceding the merger transaction.

These various requirements lead to a particularly unjust result when applied to two-tiered offers. During the period after the first-step tender offer and before the shareholder meeting to approve the second-step merger, the market price will be fixed or "capped" by the published value of the consideration to be offered in the second step. Thus, by using the market value of the stock just prior to the merger and excluding any value arising from the accomplishment of the merger, an appraisal court would have to fix "fair value" at exactly the price at which the acquiring corporation announced it would complete the second-step merger. Dissenting shareholders, therefore, would gain nothing by exercising their appraisal rights. To protect shareholders from abusive two-tiered offers, it is necessary to reform existing appraisal remedies.

2. Proposals to Reform Appraisal Statutes

Appraisal statutes should give courts great flexibility to take into account the factors of value that have contemporary significance in comparable business transactions, and exercising appraisal rights should be less burdensome and less expensive to the unsophisticated shareholder.

The recently adopted reform of the New York appraisal statute goes a long way toward achieving these goals. The New York law makes compliance less difficult for dissenting shareholders by requiring only a single written notice of election to dissent. The new law also requires the acquiring corporation to make the dissenting shareholders a written offer within fifteen days after the later of notice of dissent or consummation of the merger at a price it considers to be "fair value," and to accompany the writing with an advance payment of eighty percent of the amount of such offer if the merger has been consum-

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169 See, e.g., OHIO REV. CODE ANN. § 1701.85(C) (Page 1978).
171 N.Y. BUS. CORP. LAW § 623(a), (c) (McKinney 1982). This alleviates some of the burden and confusion previously experienced by dissenting shareholders when they had to file a written objection to the merger prior to the shareholder vote and then again give notice of an election to dissent after the merger was authorized. Dual notice is still required in Delaware. See supra note 158 and accompanying text.
Thus, shareholders wishing to dissent will not be discouraged by the prospect of waiting through a lengthy appraisal proceeding to obtain any money.

Should either the corporation fail to make an offer or a shareholder reject such offer, a court will then determine the fair value of the shares. It is here, perhaps, that the New York law adopted the most significant reform of appraisal law. The new law eliminated the statutory language which excluded from the determination of fair value any appreciation or depreciation induced by the merger. In determining fair value, the appraisal court is now directed to consider the nature of the transaction giving rise to the shareholder's right to receive payment for shares and its effects on the corporation and its shareholders, the concepts and methods then customary in the relevant securities and financial markets for determining fair value of shares of a corporation engaging in a similar transaction under comparable circumstances and all other relevant factors.

This reform provides the necessary flexibility to deal with emerging acquisition techniques, and, particularly relevant to two-tiered tender offers, it appropriately frees the appraisal court from the statutory obligation of determining "fair value" primarily or conclusively by reference to the market value of the shares just prior to the merger:

The case law interpretation of fair value has not always reflected the reality of corporate business combinations. These transactions involve the sale of the corporation as a whole, and the corporation's value as an entirety may be substantially in excess of the actual or hypothetical market price for shares trading among investors. Thus, experience has demonstrated that large premiums over market price are commonplace in mergers and in asset acquisitions.

Thus, in determining fair value, the New York law permits the appraisal judge to consider the increase in intrinsic value attributable to the successful culmination of the first-step tender offer as well as the

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167 N.Y. BUS. CORP. LAW § 623(g) (McKinney 1982). The shareholder must first submit the stock certificates for inspection and notation in accordance with § 623(f).

168 Id. § 623(h)(4).

169 Id. Further, the new law eliminates the unnecessary cost of an appraiser or referee and provides that the court determine fair value without a jury. Id.

170 See supra notes 162-63 and accompanying text.


172 The step-up in intrinsic value following the tender offer, which was noted in Michael Bradley's study, see supra notes 105-06 and accompanying text, will not be reflected in the market
additional synergistic benefits to be gained by the consummation of the second-step merger.173 The new statute would also allow the judge to apply what some commentators feel is the best measure of financial fairness, “third-party sale value”—the price the acquired company's shareholders would have received had the company been sold, as a whole, to another unaffiliated purchaser.174

The New York reform also provides an express statement of legislative intent that, except where the corporate action is fraudulent or unlawful as to the shareholder, a shareholder's right to dissent and receive fair value for his shares is his exclusive remedy.175 This limitation is especially appropriate with respect to two-tiered offers. As discussed earlier,176 shareholders should not be permitted to invoke a court’s equity jurisdiction to enjoin a merger which fails to pass “entire fairness” scrutiny; the offeror in a two-tiered deal is unrelated to the target and thus owes no fiduciary duty to the target shareholders when completing the second step merger.177

Appraisal reform such as that adopted in New York is to be applauded. Provisions that serve to make appraisal less onerous and more expeditious are likely to deter offerors from structuring two-tiered deals with inappropriately low second-step consideration. Without an effec-

price of target shares in a two-tiered offer because the low second-step consideration, which was announced when the entire two-step deal was proposed, will act as a ceiling or “cap” on the market price. Thus, it is important that the appraisal judge be permitted to consider this step-up in intrinsic value in the appraisal proceeding, rather than restrict his determination of fair value to the market price prevailing just prior to the merger.

173 As described by Chazen, supra note 162, at 1445, synergistic benefits include:

such things as the opportunity to eliminate duplicative operations, the possibility that the stock market will apply a higher price earnings multiple to the company's earnings when it is part of a larger enterprise than when it was independent and the benefits the buyer obtains simply from having control of the company: protection against a takeover by a knave or a fool, and the ability to set business policy and determine the timing of a sale of the business.

174 Id. at 1439. See also Chazen, Friedman, & Feuerstein, Premiums and Liquidation Values: Their Effect on Fairness of an Acquisition, in PRACTISING LAW INSTITUTE, ELEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 143, 163 (1980), who state:

If [20 cases in 20 states] were fully litigated within the context of present investment banking thinking, and in the context of a stock market that for a number of years has evaluated companies at about half of what they could be worth in a sale context, 80 percent of the highest courts would hold that the banker has to give substantial weight to the [third-party] sale value.

(statement by Martin Lipton).


176 See supra notes 147-55 and accompanying text.

177 The New York reform rules out entire fairness scrutiny as well as other actions to enjoin the merger except where the proposed transaction is fraudulent or unlawful as to the shareholder. N.Y. BUS. CORP. LAW § 623(k) (McKinney 1982). It is not likely that a mere allegation that the two-tiered pricing constitutes a manipulative act under § 14(e) of the Securities Exchange Act, 15 U.S.C. § 78n(e) (1976), for example, would open the door to an alternative remedy under state law.
tive appraisal remedy, offerors may be tempted to try to lock out other bids by financing an unusually high first-step offer at the expense of the consideration promised in the second step. With an accessible appraisal remedy that recognizes the typical step-up in intrinsic value of target shares after a successful tender offer as well as flexible measures of determining fair value, potential bidders will be deterred from structuring two-tiered bids with second-step consideration less than the fair appraisal value that is likely to be determined by the court.\textsuperscript{178}

IV. Conclusion

The two-tiered pricing structure is a strong tactical device to enable offerors to acquire 100% control of target corporations in two integrated steps. The availability of the device, however, creates great potential for abuse and its use has triggered shareholder claims of manipulation, coercion, inherent unfairness, and breach of fiduciary duties. Two-tiered offers should not, however, be regulated out of existence; rather, as this Comment suggests, reforms in the federal and state laws that govern corporate takeover transactions would provide sufficient safeguards against the noted concerns.

The recently adopted SEC rule 14d-8—requiring offerors to accept all shares tendered during the entire period of the offer on a pro rata basis—goes a long way toward curing the defects in the prior ten-day proration period, which often closed out unsophisticated investors from the high first-step consideration and deprived other companies potentially interested in the target of the time necessary to develop a strategy and announce a competing bid. The SEC's authority to adopt rule 14d-8 can be questioned because Congress expressly rejected an essen-

\textsuperscript{178} This is not to imply that determining fair value will be simple or self-evident. Appraisal statutes similar to that adopted in New York would not eliminate the battle of experts or the judgmental nature of a valuation proceeding.

If, for example, an appraisal court accepted the theoretical relevance of the post-tender-offer step-up in value that Michael Bradley reported, see supra notes 105-06 and accompanying text, the application of such a factor would not always be straightforward. Bradley found, for example, that after successful completion of a partial tender offer, target company shares were typically valued 36% above the trading price prevailing prior to the offer. See supra text accompanying note 107. The trading price prevailing prior to an offer is not always stable. The trading price for Marathon, for example, fluctuated from $53.90 to $78.00 in the three months prior to when the bidding war between U.S. Steel and Mobil Oil began on October 30, 1981. (There seem to have been two price run-ups in anticipation of a tender offer for Marathon. The first run-up immediately followed the July 2, 1981 announcement of a white knight agreement between Conoco and Du Pont that foretold the defeat of the Mobil bid for Conoco. Conceivably, that news event triggered speculation that Mobil or other firms might seek another oil company ripe for takeover, such as Marathon. The second price run-up was in anticipation of the October 30, 1981 bid by Mobil.) Therefore, an attempt to apply Bradley's typical 36% step-up in value to the range of prices prevailing in the one to three months prior to October 30 would lead to a "fair value" determination ranging from $67 to $109.
tially identical statutory provision in 1968, but even if it is found that the SEC did overstep its authority, the SEC could adopt a fifteen-day proration rule which would provide similar investor protection and be more in line with congressional intent. This Comment also argues that two-tiered offers are not per se manipulative under section 14(e) of the Securities Exchange Act, but recognizes that in some situations offers structured with inadequately low second-step consideration may be unlawful.

State law claims that equal consideration be paid in both steps, or that the "entire fairness" and "business purpose" scrutiny developed in Singer v. Magnavox\textsuperscript{77} be applied to enjoin the second step merger, should be rejected. Rather, when there is no evidence of fraud, a dissenting shareholder's exclusive remedy should be his state law appraisal rights. To make this right meaningful and responsive to two-tiered offers as well as other emerging corporate takeover transactions, states should follow the lead of New York in developing a statute which is easy to comply with, provides dissenting shareholders with money up front, and permits the appraisal judge to consider both the nature of the transaction and current methods of measuring financial fairness used in the securities and financial markets when determining the fair value of the shares.

With adequate safeguards and remedies, the two-tiered tender offer can be an effective tool in the mergers and acquisitions field. To bar it completely would be to contravene the intent of the Congress that regulation of tender offers favor neither the acquiring corporation nor the target. So long as shareholders remain adequately protected, tender offer techniques should be permitted to succeed or fail on their own, not as a result of regulatory interference.

\textsuperscript{77} 380 A.2d 969 (Del. 1977).