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A Peek Under the Shell: Investment Bank's Equity Position in Tender Offeror Should Trigger Disclosure Requirements of the Williams Act

A PEEK UNDER THE SHELL: INVESTMENT BANK'S EQUITY POSITION IN TENDER OFFEROR SHOULD TRIGGER DISCLOSURE REQUIREMENTS OF THE WILLIAMS ACT

In 1968 Congress enacted the Williams Act[1] to amend the Securities and Exchange Act of 1934[2] to regulate tender offers.[3] A tender offer is a public bid that an entity (bidder) makes to acquire a company's registered equity securities from the company's existing shareholders.[4] In enacting the Williams Act, Congress intended to protect shareholders from tender offers

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1. Securities-Corporate Equity Ownership-Disclosure (Williams) Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. § 78m(d)-(e), 78n(d)-(f) (1982 & Supp. IV 1986)).

2. Securities and Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-78kk (1982 & Supp. IV 1986).

3. *See* H.R. REP. No. 1711, 90th Cong. 2d Sess. 3, (1968) (stating that purpose of Williams Act is to require disclosure of pertinent information to shareholders in tender offers or in corporate stock-repurchase plan) *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811. Until Congress enacted the Williams Act, federal securities laws only required disclosure when opposing parties solicited shareholders' rights to vote on issues at shareholders meeting (proxy contests). *Id.* at 2813; *see* 15 U.S.C. § 78n(a)-(c) (1982 & Supp. IV 1986) (regulating solicitation of proxies). The Securities and Exchange Act (Act) of 1934 requires that the party opposing management in a proxy contest inform the shareholders of the identity of the participants in the proxy contest and the amount of stock that the participants hold in the company. *Id.* The Act also provides that the party opposing management in a proxy contest must file information with the Securities and Exchange Commission (SEC). *Id.* In enacting the Williams Act, Congress sought to apply to tender offers the same regulatory scheme of disclosure that Congress had applied to proxy contests. H.R. REP. No. 1711, *supra*, at 2813. By requiring disclosure from bidders to shareholders of the target company in a tender offer, Congress intended to prevent a bidder from exerting pressure on shareholders to tender stock without adequate information concerning the bidder's identity and plans for the target company. *Id.* at 2812.

4. *See* H.R. REP. No. 1711, *supra* note 3, at 2811 (describing tender offers). Although the legislative history of the Williams Act describes a tender offer, the text of the Williams Act does not define the term "tender offer". *See* 15 U.S.C. § 78m(d)-(e), 78n(d)-(e) (1982 & Supp. IV 1986) (mentioning tender offer but not defining term); *see also* Wellman v. Dickinson, 475 F. Supp. 783, 823-824 (S.D.N.Y.) (reasoning that circumstances and terms of party's plan and actions to acquire stock determines whether party made tender offer) *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983); E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 69-70 (1973) (defining term "tender offer" as public offer or public solicitation to purchase during fixed time period all or portion of class of securities at specified price). *See generally*, Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973) (analyzing term "tender offer"). A party making the tender offer (bidder) usually sets the offer price above the current market price. *Id.* The bidder also may place conditions on the tender offer. *Id.* If the tendering shareholders and other parties, such as financiers, meet the conditions of the tender offer, the tender offer obligates the bidder to purchase the tendered shares according to the terms of the bidder's tender offer. *Id.*

that disclose only the price and expiration date of a tender offer.[5] Specifically, Congress designed the Williams Act to provide the shareholders with the relevant facts of a tender offer to enable the shareholders to make an informed decision on whether to sell or to retain the shares of the publicly-held company that the bidder seeks to acquire (target company).[6] Accordingly, the Williams Act requires a bidder to disclose to the Securities and Exchange Commission (SEC) and to shareholders of the target company information that is material to the shareholders' evaluation of the bidder's offer, including the bidder's identity and the terms of the offer.[7]

Since Congress enacted the Williams Act, persons that seek to control publicly held companies or to own the companies' equity securities increasingly have used tender offers to gain control or ownership of publicly held companies.[8] Because of the high rate of return that capital providers can realize in funding tender offers and because of bidders' record of repayment, investment banks often can provide bidders with large amounts of capital

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5. *See* H.R. REP. No. 1711, *supra* note 3, at 2811 (stating that Williams Act attempts to insure that shareholders in tender offer will receive adequate information regarding bidder and bidder's tender offer before shareholder responds to bidder's tender offer); *see also* Edgar v. MITE, 457 U.S. 624, 633 (1981) (determining that, in requiring bidders to make disclosures to SEC and to shareholders of target companies, Congress intended to protect shareholders in tender offers). *But see* Bowers, *Cash Tender Offers and Mandated Disclosure*, 20 AM. BUS. L. J. 59, 61 (1982) (criticizing Congress' disclosure policy underlying Williams Act by questioning whether shareholders in tender offers actually use information other than price of bid and expiration date in reaching investment decision).

6. *See* H.R. REP. No. 1711, *supra* note 3, at 2813 (stating that purpose of Williams Act is to allow shareholders fair opportunity to make informed decision on whether shareholders should accept or reject bidder's tender offer). In requiring bidders to make disclosures to shareholders of the target companies, Congress reasoned that information concerning the bidder and the bidder's tender offer would allow shareholders to make comparisons on the future of the company if incumbent management continues or if the bidder succeeds in gaining control of the company. *Id.*

7. 15 U.S.C. § 78n(d)(1) (1982 & Supp. IV 1986); *see* 15 U.S.C. § 78m(d) (1982 & Supp. 1986) (listing specific disclosure requirements). Section 78m(d) of the Williams Act prescribes the information that a bidder must disclose to the Securities and Exchange Commission (SEC) and to sharheolders of the target company. *See* 15 U.S.C. § 78m(d) (1982 & Supp. IV 1986). First, § 78m(d) provides that a person that obtains more than 5% of target company's registered stock (disclosing party) must disclose the person's identity, background, financing, and plans for the target company. *Id.* at § 78m(d)(1)(A-C). Additionally, § 78m(d) provides that the disclosing party must disclose the amount of the target company's stock that the disclosing party owns and information regarding any contracts with another person that concerns the target company's stock. *Id.* at § 78m(d)(1)(D-E). Finally, the Williams Act empowers the SEC to require additional specific disclosures from the bidder that would aid the shareholders facing a tender offer. *Id.* at § 78n(d)(1).

8. *See* Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U. L. REV. 991, 991-992 (1973) (discussing increase in number of tender offers after enactment of Williams Act). During 1988 the number of tender offers and takeovers in the United States reached 3,310 transactions and totalled more than $311 billion. *See* Washington Post, Jan. 31, 1989, at E4, col.5. The level of takeover activity for 1988 increased 41.6% over the 1987 level of takeover activity. *Id.*; *see also* Brancato, *Takeover Bids and Highly Confident Letters*, Cong. Res. Serv., 1, 2 (August 28, 1987) (citing increase in number of tender offers due to investment banks' expanding economic power).

to fund tender offers.[9] In arranging a large proportion of the financing for bidders, investment banks have created new forms of financing to fund tender offers, including high yield bonds (junk bonds) and temporary equity investments (bridge loans).[10] Moreover, some investment banks have established networks of investors that are ready to purchase the debt or equity that finances tender offers.[11] Because of the investment banks' central position in tender offers, the investment banks in many transactions exceed their traditional roles of financial advisors and intermediaries to become either direct investors or option holders in the equity of the bidder.[12] In transactions in which an investment bank becomes a direct investor or option holder, a question arises over whether the Williams Act and SEC regulations require the investment bank to make any disclosures to the SEC and shareholders of the target company.[13]

Courts have adopted conflicting approaches to determine whether an investment bank that participates in a tender offer must make disclosures to the SEC and to shareholders of the target company.[14] One approach interprets the Williams Act to require an investment bank to make disclosures if the investment bank has a minority equity stake in the bidder and if the investment bank plays an important role in forming and capitalizing the bidder (principal participant test).[15] A second approach interprets the Williams Act as requiring an investment bank to make disclosures if the investment bank is, directly or indirectly, a potential beneficial owner of more than five percent of the target company's common stock (beneficial

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9. *See Brancato*, *supra* note 8, at 7, 8 (stating that as of May 1987 the investment bank, Drexel Burhnam Lambert, Inc., had issued commitments totalling $50 billion to arrange financing for tender offers). In addition to investment banks arranging financing for tender offers, commercial banks provide over half the funds necessary to finance takeovers. *Id.* at 8.

10. *See* Brancato, *supra* note 8, at 1 (stating that investment banking firms, in becoming dominant force in tender offers, have gained significant economic power). To help a bidder initiate a tender offer, an investment bank may issue to the bidder a letter that states that the investment bank is confident that the investment bank can arrange financing to fund the bidder's tender offer (highly confident letter). *Id.* at 2. After issuing a highly confident letter, an investment bank often finances a tender offer by selling high yield debt obligations of the bidder (junk bonds) to investors or by making a temporary cash infusion in the bidder (bridge loan) until the investment bank can sell the bidder's stock or bonds to investors. *Id.*

11. *See id.* at 16 (citing evidence that investment bankers draw on pool of investors that previously have provided financing for tender offers).

12. *See id.* at 1 (stating that investment bankers have abandoned traditional advisory role as principal means of profit in favor of selling new financial products and trading on own accounts).

13. *See* City Capital Assocs. Ltd. Partnership v. Interco Inc., 860 F.2d 60, 63 (3d Cir. 1988) (considering whether investment bank particpating in tender offer is subject to disclosure requirements of Williams Act); Koppers Co. v. American Express Co., 689 F. Supp 1371, 1387-1388, (W.D. Pa. 1988) (same).

14. *See infra* notes 51-102 and accompanying text (discussing courts' conflicting approaches to determine whether investment bank must make disclosures).

15. *See* Koppers v. American Express Co., 689 F. Supp. 1371, 1390 (W.D. Pa. 1988) (presenting principal participant test); *infra* notes 52-65 and accompanying text (discussing *Koppers* court's principal participant test).

ownership test).[16] Instead of interpreting the Williams Act, a third approach interprets SEC regulations as requiring an investment bank to disclose information only if the investment bank controls the entity that actually makes the tender offer (control test).[17] To provide predictability and uniformity in the rules and regulations that govern tender offers to enable the public securities markets to operate efficiently, the SEC should revise its regulations to conform with both the text and the legislative history of the Williams Act.[18] Specifically, to conform with the text and legislative history of the Williams Act, the SEC should promulgate rules and regulations that codify the beneficial ownership test.[19]

I. *The Williams Act's Disclosure Provisions*

The Williams Act contains several provisions that govern a bidder's obligation to disclose information to the SEC and shareholders of a target company.[20] Section 78n(d)(1) of the Williams Act provides that, if a person participating in a tender offer would be a beneficial owner of more than five percent of the target company's stock upon consummation of the tender

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16. *See* City Capital Assocs. Ltd. Partnership v. Interco Inc., 860 F.2d 60, 68 (3d Cir. 1988) (Weis, J, dissenting) (presenting beneficial ownership test); *infra* notes 91-102 and accompanying text (discussing *Interco* dissenting opinion's beneficial ownership test).

17. *See Interco*, 860 F.2d at 64-65 (presenting control test); *infra* notes 82-88 and accompanying text (discussing *Interco* majority's control test).

18. *See* 15 U.S.C. § 78n(d)(1) (1982 & Supp. 1986) (authorizing SEC to promulgate rules and regulations that require specific information from bidders to protect shareholders of target company and public); *see also Interco*, 860 F.2d 60, 64 (3rd Cir. 1988) (stating that predictibility in federal securities law is crucial to securities market). *But see* 54 Fed. Reg. 10,360 (1989)(to be codified at 17 C.F.R. § 240.13d-101, 240.13e-100, 240.14d-100) (proposed March 6, 1989) (proposing to amend rules that govern disclosure of equity participants in tender offers). In announcing a proposal to amend the SEC's tender offer regulations, the SEC noted that current tender offer regulations do not provide to target companies' shareholders adequate information concerning the identity and background of significant participants in the tender offer. *Id.* at 10,361. Under the proposed amendments to the SEC's tender offer regulations, a person that contributes more than 10% of the equity capital of bidder or that has a right to receive more than 10% of the profits or assets upon liquidation of bidder must make disclosures to the SEC and to the target company's shareholders. *Id.* The proposed amendments to the SEC's tender offer regulation, therefore, seemingly adopt and quantify the *Koppers* court's principal participation test. *See id.* (proposing to require significant equity participant in bidder to make disclosures); *infra* notes 51-66 and accompanying text (discussing *Koppers* court's principal participant test); *infra* notes 134-144 and accompanying text (criticizing principal participant test).

19. *See* 15 U.S.C. § 78n(d)(1) (1982 & Supp. 1986) (requiring person that would own more than 5% of target company's registered stock upon consummation of tender offer to make disclosures to shareholders of target company and SEC); 17 C.F.R. § 240.14d-100 (requiring bidder and party that controls bidder to file disclosure statement); *see also infra* notes 118-133 and accompanying text (analyzing text and legislative history of Williams Act); *supra* note 18 and accompanying text (discussing proposals to amend SEC's tender offer regulations).

20. *See* 15 U.S.C. § 78n(d)(1), 78m(d)(1) (1982 & Supp. IV 1986) (governing disclosure in tender offers); *infra* notes 21-23 and accompanying text (discussing Williams Act's disclosure provisions).

offer, the person must make disclosures to the SEC and to shareholders of the target company.[21] In addition, Section 78n(d)(2) of the Williams Act provides that the term "person" includes two or more persons acting as a partnership, syndicate, or other group for the purpose of acquiring securities of the target company.[22] Finally, Section 78n(d)(1) of the Williams Act delegates to the SEC the authority to require a bidder to disclose additional information that protects shareholders of the target company and the public interest.[23]

II. *SEC Tender Offer Regulations*

Pursuant to Section 78n(d)(1) of the Williams Act, the SEC has promulgated regulations that govern tender offers.[24] In promulgating tender offer regulations, the SEC has defined the term "bidder" as any person who makes a tender offer or on whose behalf a tender offer is made.[25] Moreover, the SEC tender offer regulations provide that a "bidder" must file with the SEC a tender offer statement that discloses the identity of the bidder, the bidder's source of funding, and the amount of the target company's stock that the bidder owns.[26] The SEC tender offer regulations also require a bidder to disclose current financial information if the bidder is not a natural person and if the bidder's financial condition is material to the shareholders' evaluation of the bidder's tender offer.[27] If the bidder is a corporation or partnership, however, the SEC tender offer regulations

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21. 15 U.S.C. § 78n(d)(1) (1982 & Supp. IV 1986). In the SEC tender offer regulations, the SEC has defined the term "beneficial owner" as a person that, directly or indirectly, acquires shares of registered stock through a purchase, contract or other arrangement. 17 C.F.R. § 240.13d-3. Moreover, the SEC tender regulations provide that a person is a beneficial owner of stock if the person has the right to acquire ownership of shares of stock within 60 days after expiration of the tender offer. *Id.* at § 240.13d-2(d)(i).

22. 15 U.S.C. § 78n(d)(2) (1982 & Supp. IV 1986).

23. 15 U.S.C. § 78n(d)(1) (1982 & Supp. IV 1986). In authorizing the SEC to protect shareholders of a target company and the public interest, the Williams Act empowers the SEC to promulgate rules and regulations that prevent the person making the tender offer from defrauding, deceiving, or manipulating the shareholders of the target company. *Id.* at § 78n(e); *see* 17 C.F.R. § 240.14e-1,2 (1988) (regulating tender offers to prevent fraud, deception or manipulation).

24. *See* 17 C.F.R. § 240.14d-e (1988) (regulating tender offers).

25. *Id.* at § 240.14d-1(b)(1).

26. *See id.* at § 240.14d-3(a)(1) (requiring bidder to file Schedule 14D-1 with SEC). In addition to requiring a bidder to file a disclosure statement with the SEC, the SEC tender offer regulations require a bidder to deliver a copy of the tender offer statement to the target company and to any other bidder. *Id.* at § 240.14d-3(a)(2)(i),(ii).

27. *Id.* at § 240.14d-100 (Item 9 of Special Instruction for Complying with Schedule 14D-1). In explaining when a bidder must disclose financial information, the SEC tender offer regulations state that the fact and circumstances concerning a tender offer may influence whether financial information of the bidder or person that controls the bidder is material to the shareholders of the target company. *Id.* If a bidder must disclose financial information to the SEC and shareholders of the target company, the SEC tender offer regulations require the bidder to disclose a current income statement, current balance sheet, and net income per common share of bidder's stock. *Id.* at § 240.14d-6(e)(1)(viii).

require disclosures from the person that controls the bidding entity.[28] The SEC tender offer regulations also require a person controlling the bidding entity to file financial information if the controlling person formed the bidder for the sole purpose to make the tender offer and if the financial information of the controlling person is material to the shareholders' evaluation of the bidding entity's tender offer.[29]

III. *Judicial Approaches in Determining Whether an Investment Bank that Participates in a Tender Offer Must Make Disclosures*

Since Congress enacted the Williams Act and the SEC has promulgated tender offer regulations, target companies have attempted to defeat bidders' tender offers by bringing actions in court to enjoin bidders' tender offers.[30] In attempting to enjoin the bidders' tender offers, the target companies usually claim that either the bidder or an entity connected to the tender offer violated the Williams Act by failing to make appropriate disclosures under the Williams Act or the SEC tender offer regulations.[31] In particular, two target companies have brought separate federal suits alleging that tender offers for the companies' stock violated the Williams Act because investment banks that owned a portion of the bidders failed to make disclosures under the Williams Act and the SEC tender offer regulations.[32] In analyzing whether the investment banks were subject to the disclosure requirements of the Williams Act, the two federal courts interpreted the Williams Act

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28. *Id.* at § 240.14d-100 (Item 9 of Special Instructions for Complying with Schedule 14D-1).

29. *Id.*; *see supra* note 28 (stating that, under SEC tender offer regulations, facts and circumstances may influence determination of materiality of financial information).

30. *See, e.g.*, City Capital Assocs. Ltd. v. Interco Inc., 860 F.2d 60, 62-63 (3d Cir. 1988) (considering whether to enjoin bidder's tender offer after target company alleged that, by failing to make disclosures to SEC and target company's shareholders, investment bank that had option to purchase up to 36% of bidder's common stock violated Williams Act); IU Int'l Corp. v. NX Acquisition Corp., 840 F.2d 220, 221 (4th Cir. 1988) (considering whether to enjoin bidder's tender offer after target company alleged that, by not disclosing either actual or expected sources and terms of bidder's financing for tender offer, bidder violated Williams Act) *aff'd en banc*, 840 F.2d 229 (4th Cir. 1988); Newmont Mining Corp. v. Pickens, 831 F.2d 1448, 1449 (9th Cir. 1988) (considering whether to enjoin bidder's tender offer after target company alleged that, by failing to disclose actual sources and terms of bidder's financing for tender offer, bidder violated Williams Act); Koppers v. American Express Co., 689 F. Supp. 1371, 1388 (W.D. Pa. 1988) (considering whether to enjoin bidder's tender offer after target company alleged that, by failing to make disclosures to SEC and to target company's shareholders, investment bank that owned 46.1% of bidder's common equity violated Williams Act). *See generally* Note, *supra* note 8, at 1018 (noting that target companies routinely bring action under Williams Act to delay or defeat tender offers).

31. *See supra* note 30 (citing cases in which target company alleged that bidder violated Williams Act by failing to make proper disclosures to SEC or target campany's shareholders).

32. *See* City Capital Assocs. Ltd. Partnership v. Interco Inc., 860 F.2d 60, 63-65 (3d Cir. 1988) (analyzing whether investment bank that has equity interest in entity that makes tender offer must make disclosures to SEC and target company's sharholders); Koppers Co. v. American Express Co., 689 F. Supp. 1371, 1387-1393 (W.D. Pa. 1988) (same).

and the SEC tender offer regulations.[33] In *City Capital Associates Ltd. Partnership v. Interco Inc.*[34] a federal court of appeals, with one judge dissenting, affirmed a district court's ruling that an investment bank that held an option to purchase common equity in the bidder was not a "bidder" under the SEC regulations.[35] In contrast, in *Koppers Co., Inc. v. American Express Co.*[36] a federal district court determined that the investment bank's direct equity investment in a company that partners formed to make the tender offer (shell company) and commitment to provide additional capital to the offeror was sufficient to deem the investment bank a bidder under the Williams Act and SEC regulations.[37]

In *Koppers* the United States District Court for the Western District of Pennsylvania considered whether an investment bank that owned a forty-six percent equity interest in an entity that issued a tender offer was subject to the disclosure requirements of the Williams Act.[38] The investment bank in *Koppers*, Shearson Lehman Hutton, Inc. (Shearson Lehman) invested over $23 million in a partnership, BNS Partners, to acquire shares of stock in Koppers Co., a publicly held company.[39] Shearson Lehman's investment represented a forty-six and one tenth percent interest in BNS Partners.[40] The other two partners of BNS Partners, Bright Aggregates, Inc. and Speedward Ltd., owned a forty-nine percent interest and a four and nine tenths percent interest in BNS Partners respectively.[41] As partners in BNS

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33. *See infra* notes 59-62 and accompanying text (discussing *Koppers* court's interpretation of Williams Act and SEC tender offer regulations); *infra* notes 82-87 and accompanying text (discussing *Interco* majority's interpretation of Williams Act and SEC tender offer regulations); *infra* notes 91-94, 97-99 and accompanying text (discussing *Interco* dissenting opinion's interpretation of Williams Act and SEC tender offer regulations).

34. 860 F.2d 60 (3d Cir. 1988).

35. City Capital Assocs. Ltd. Partnership v. Interco Inc., 860 F.2d 60, 65 (3rd Cir. 1988); *see infra* notes 85-93 and accompanying text (discussing Third Circuit's holding in *Interco*); *infra* notes 104-107 and accompanying text (discussing dissenting opinion in *Interco*).

36. 689 F. Supp. 1371 (W.D. Pa. 1988).

37. Koppers Co., Inc. v. American Express Co., 689 F. Supp. 1371, 1392 (W.D. Pa. 1988); *see infra* notes 47-66 and accompanying text (discussing district court's holding in *Koppers*).

38. *Koppers*, 689 F. Supp. at 1388-1389.

39. *Id.* at 1376, 1377. In *Koppers* Shearson Lehman Hutton, Inc. (Shearson Lehman) invested in BNS Partners through Shearson Lehman's wholly owned subsidiary, SL-Merger, Inc. (SL-Merger). *Id.* at 1376. American Express Co. owned 60% of Shearson Lehman Brothers Holdings, Inc. (Shearson Holdings), which was Shearson Lehman's parent company. *Id.* SL-Merger had no other business activities other than participating in BNS, Inc.'s tender offer. *Id.*

40. *Id.* at 1377.

41. *Id.* In *Kopper* Bright Aggregates, a partner in BNS Partners, was a wholly-owned subsidiary of Beazer, PLC. (Beazer). *Id.* Bright Aggregates was the mananging partner of BNS Partners. *Id.* Speedward Ltd., a partner in BNS Partners, was a wholly-owned subsidiary of NatWest Investment Bank Ltd., a subsidiary of National Westminister Bank PLC. *Id.* As part of the partners' plan to gain control of Koppers Co., BNS Partners was to acquire shares of Koppers stock before another entity that the partners formed, BNS Inc., made a tender offer. *Id.*

Partners, Shearson Lehman, Bright Aggregates, Inc., and Speedward Ltd. formed BNS, Inc. to make a tender offer for Koppers stock.[42] To fund BNS, Inc.'s approximate $1.7 billion tender offer for Koppers stock, Citibank agreed to provide $864 million in loans, Shearson Lehman agreed to contribute $570 million in capital, and Bright Aggregates' sole shareholder, Beazer PLC, agreed to contribute $298 million in capital.[43] In commencing the tender offer for Koppers' stock, BNS, Inc., Bright Aggregates, and Beazer PLC filed separate disclosure documents with the SEC.[44] Shearson Lehman, however, did not file any disclosure statements in connection with BNS, Inc.'s tender offer.[45] Koppers, in seeking to enjoin BNS, Inc.'s tender offer in the United States District Court for the Western District of Pennsylvania, claimed that Shearson Lehman violated the Williams Act by failing to make disclosures under the Williams Act and the SEC tender offer regulations.[46]

In analyzing Koppers' request for a preliminary injunction, the district court in *Koppers* initially noted the sparcity of case law addressing the definition of the term "bidder" under the Williams Act or SEC tender offer regulations.[47] The *Koppers* court, however, recognized a few guidelines from prior cases for determining whether a party to a tender offer is a bidder subject to the SEC disclosure requirements.[48] First, the *Koppers* court stated that investors who form a shell company with the investors' own shares of the target company to make a tender offer are not bidders if the investors have no additional commitments to finance the tender offer.[49]

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42. *Id.* In *Koppers* Bright Aggregates, Speedward Ltd. and Shearson Lehman entered into an agreement concerning the ownership and control of BNS, Inc. *Id.* at 1385. Pursuant to the terms of the BNS, Inc. Stockholder Agreement (Agreement), BNS, Inc. would issue three classes of stock. *Id.* According to the Agreement, Bright Aggregates would own all of the 490 shares of BNS, Inc. Class A stock and SL-Merger, Shearson Lehman's subsidiary, would own 461 shares of BNS, Inc. Class B stock. *Id.* Additionally, the Agreement provided that Speedward would own 24 shares of BNS, Inc. Class B stock and 25 shares of BNS, Inc. Class C stock. *Id.* Moreover, Bright Aggregates, pursuant to the Agreement's division of voting rights between the classes of stock, could control approximately 80% of the voting power of BNS, Inc. and could elect six of the eight members of BNS, Inc's Board of Directors. *Id.* Under the Agreement, Bright Aggregates had an option to purchase at a fixed price SL-Merger's and Speedward's interest in BNS, Inc. *Id.* at 1387. The Agreement also provided that SL-Merger and Speedward had options to force Bright Aggregates to purchase all the Class B and Class C stock of BNS, Inc. *Id.* Pursuant to the Agreement, if BNS, Inc.'s tender offer for Koppers stock was successful, the partners in BNS Partners would disslove the partnership by transferring the Koppers stock that BNS Partners owned to BNS, Inc. *Id.* at 1378.

43. *Id.* at 1378.

44. *Id.*

45. *Id.*

46. *Id.* at 1380. In seeking to enjoin BNS, Inc.'s tender offer, Koppers alleged that Shearson Lehman's activities in BNS Inc.'s tender offer made Shearson Lehman a bidder under SEC regulations. *Id.* at 1387-1388.

47. *Id.* at 1388.

48. *Id.*

49. *Koppers*, 689 F. Supp. at 1388. In stating that investors are not bidders if they form

Second, the *Koppers* court stated that mere status as majority shareholder in the parent company of the bidder without financial participation in the tender offer is not enough to render the majority shareholder a bidder.[50] Finally, the *Koppers* court explained that parties that are the motivating force in forming and capitalizing a tender offeror are bidders subject to disclosure requirements of the SEC tender offer regulations.[51]

After articulating guidelines for determining whether a party to a tender offer is subject to the Williams Act and SEC disclosure requirements, the district court in *Koppers* applied the guidelines to determine whether Shearson Lehman's activities in BNS, Inc.'s tender offer required Shearson Lehman to make disclosures to the SEC and Koppers' shareholders.[52] Reviewing minutes of negotiations between Shearson Lehman and Beazer PLC, the *Koppers* court first determined that Shearson Lehman intended to play an aggressive role in the tender offer for Koppers' stock.[53] As evidence of Shearson Lehman's aggressive role, the district court noted Shearson Lehman's direct equity investments in the partnership that acquired Koppers' stock prior to the tender offer and in BNS, Inc., the corporation that would make the actual tender offer.[54] Moreover, the *Koppers* court noted that Shearson Lehman's commitment of $570 million in capital to fund BNS, Inc.'s tender offer for Koppers stock would allow Shearson Lehman to acquire additional interests in BNS, Inc.[55] Additionally, the district court in *Koppers* recognized that Shearson Lehman would receive

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the offeror with shares of the target company but have no additional financial commitment to the offeror, the *Koppers* court relied on the district court's decision in *Warnco, Inc. v. Galef. Id.*; *see* Warnco, Inc. v. Galef, No. B-86-146, slip op. at 13-16 (D. Conn. April 3, 1986) (holding that investors that only form entity that makes tender offer without commitment from investors to finance tender offer are not bidders).

50. *Koppers*, 689 F. Supp. at 1388. In stating that a party with majority ownership in the parent of the offeror but without further financial participation in the tender offer is not a bidder, the *Koppers* court relied on the district court's decision in *Revlon, Inc. v. Pantry Pride, Inc. Id.*; *see* Revlon, Inc. v. Pantry Pride, Inc., 621 F. Supp. 804, 814, (D. Del. 1985) (determining that corporations that controlled parent of company making tender offer were not bidders under SEC tender offer regulations because corporations had not participated either in capitalizing bidder or in financing bidder's tender offer).

51. *Koppers*, 689 F. Supp. at 1388. In stating that the two individuals who form and capitalize an entity for the sole purpose of making the tender offer are bidders, the *Koppers* court relied on *Pabst Brewing Co. v. Kalmanovitz. Id.*; *see* Pabst Brewing Co. v. Kalmanovitz, 551 F. Supp. 882, 891-892 (D. Del. 1982) (determining that persons that form and capitalize company to make tender offer are bidders subject to disclosure requirements of Williams Act and SEC tender offer regulations).

52. *Koppers*, 689 F. Supp. at 1389.

53. *Id.*

54. *Id.*; *see supra* note 43 and accompanying text (discussing terms of BNS, Inc. Stockholder Agreement).

55. *Koppers*, 689 F. Supp. at 1390. Pursuant to an arrangement with BNS, Inc., Shearson Lehman would receive either notes or preferred stock from BNS, Inc. for contributing $570 million to finance BNS, Inc.'s tender offer for Koppers stock. *Id.* If Shearson Lehman received preferred stock in BNS, Inc., Shearson Lehman would gain limited voting rights that accompanied the preferred stock. *Id.*

large fees for advising BNS, Inc. and for underwriting a portion of the financing of the tender offer for Koppers stock.[56] After analyzing all of Shearson Lehman's activities in BNS, Inc.'s tender offer for Koppers stock, the district court in *Koppers* reasoned that Shearson Lehman's role far surpassed the typical investment banker's role in a tender offer.[57] The *Koppers* court, therefore, determined that Shearson Lehman played a central, motivating role in forming and capitalizing the tender offer for Koppers stock.[58]

After determining that Shearson Lehman played a principal role in forming and capitalizing BNS, Inc., the *Koppers* court interpreted the text and legislative history of the Williams Act to determine whether the Williams Act required Shearson Lehman to make disclosures to the SEC and to Koppers shareholders.[59] In interpreting the Williams Act the court in *Koppers* determined that Congress, in enacting the Williams Act, intended that the disclosure requirements would insure that shareholders would have an opportunity to make an informed decision on a tender offer.[60] The *Koppers* court reasoned that shareholders in a tender offer would find information concerning the financial condition of a principal investor in the bidder particularly important because of the impact the principal investor may have on the success of the tender offer and the future of the surviving company.[61] The *Koppers* court further determined that, in enacting the disclosure requirements of the Williams Act, Congress intended to provide the SEC and the Federal Reserve Board the opportunity to monitor tender offers for violations of federal securities laws.[62] The *Koppers* court reasoned that information concerning Shearson Lehman may aid the SEC in identifying conflicts of interest and breaches of fiduciary duty that may arise from Shearson Lehman's activities as a broker or dealer in Koppers stock and as an investor in the bidder for Koppers stock.[63] Accordingly, the district court in *Koppers* determined that disclosures from Shearson Lehman would have aided Koppers shareholders and the federal agencies that monitor tender

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56. *Id.* In *Koppers* BNS Inc. agreed to pay Shearson Lehman fees for underwriting shares of Koppers stock that shareholders tendered and for underwriting the $570 million in financing for the tender offer. *Id.* Shearson Lehman also stood to make a 25% compounded annual return on its equity investment in BNS, Inc. *Id.*

57. *Id.* In determining that Shearson Lehman's role in BNS, Inc's tender offer for Koppers stock exceeded the advisory and intermediary role that investment banks usually play in tender offers, the *Koppers* court characterized Shearson Lehman's participation in BNS, Inc.'s tender offer as "novel". *Id.*

58. *Id.*

59. *Id.*; *see infra* notes 137-141 and accompanying text (discussing *Koppers* court's analysis of Williams Act).

60. *Koppers*, 689 F. Supp. at 1390; *see supra* note 5 and accompanying text (discussing legislative history of Williams Act).

61. *Koppers*, 689 F. Supp. at 1391. In *Koppers*, the *Koppers* court reasoned that Shearson Lehman's multiple roles in BNS, Inc.'s tender offer for Koppers stock may present conflict of interest issues for Shearson Lehman that would be important to Koppers shareholders. *Id.*

62. *Id.* at 1390.

63. *Id.* at 1391.

offers.[64] Conceding that Shearson Lehman owned less than fifty percent of the bidder, BNS, Inc., and had limited voting rights in BNS, Inc., the *Koppers* court nonetheless determined that Shearson Lehman's principal participation as planner, investor, and financier in BNS, Inc.'s tender offer for Koppers stock subjected Shearson Lehman to the disclosure requirements of the Williams Act and the SEC tender offer regulations.[65] The district court in *Koppers*, therefore, granted Koppers' request to enjoin BNS, Inc.'s tender offer until Shearson Lehman disclosed financial information to the SEC and to shareholders of Koppers in accordance with the Williams Act and SEC tender offer regulations.[66]

In contrast to the principal paritcipant test that the United States District Court for the Western District of Pennsylvania applied in *Koppers*, the United States Court of Appeals for the Third Circuit in *City Capital Associates Ltd. Partnership. v. Interco Inc.*[67] articulated a control test in considering whether an investment bank participating in a tender offer is a bidder and, therefore, subject to the disclosure requirements of the Williams Act.[68] In *Interco* an investment banking firm, Drexel Burnham Lambert, Inc. (Drexel Burnham), agreed to arrange financing and to act as an advisor for Cardinal Acquisition Corp. (Cardinal) in Cardinal's tender offer for Interco Inc. (Interco) stock.[69] Pursuant to its agreement with Cardinal, Drexel Burnham was to arrange $1.375 billion in financing for Cardinal's proposed tender offer by selling debt or preferred securities of Cardinal.[70] Cardinal, as partial compensation to Drexel Burnham and to facilitate the sale of Cardinal's preferred securities, agreed to provide Drexel Burnham with an option to purchase or to sell to investors a maximum of thirty-six percent of Cardinal's common equity.[71] Cardinal and the principal owners

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64. *Id.* at 1391-1392.

65. *Id.* at 1390.

66. *Id.* at 1407.

67. 860 F.2d 60 (3d Cir. 1988).

68. City Capital Assocs. Ltd. v. Interco Inc., 860 F.2d 60, 65 (3d Cir. 1988).

69. *Id.* at 62. In *Interco*, a shell corporation, Cardinal Holdings Corp. owned the common equity in Cardinal Acquisition Corp. *Id.* at 61. A partnership, City Capital, owned all the common equity of Cardinal Holdings Corp. *Id.* City Partnership had two general partners, City GP I, Inc. and City GP II, Inc., and each partner owned 49% of City Partnership. *Id.* An individual, Steven Rales was sole stockholder in City GP I, Inc. *Id.* Steven Rales' brother, Mitchell Rales, was sole stockholder in City GP II, Inc. *Id.*

70. *Id.* In addition to the $1.375 billion that Drexel Burnham agreed to provide for Cardinal's tender offer, Cardinal agreed to borrow $1.225 billion from a sydicate of commercial banks to complete the financing of Cardinal's tender offer. *Id.*

71. *Id.* Pursuant to Drexel Burnham's agreement with Cardinal, the percentage of Cardinal's common equity that Drexel Burnham would receive from Cardinal depended on the amount of preferred stock of Cardinal that Drexel Burnham would have to sell to fund Cardinal's tender offer. *Id.* In addition to receiving an option to purchase a common equity interest in Cardinal, Drexel Burnham in compensation for arranging the financing for Cardinal's tender offer, would receive 1.125% of the amount of written financing commitments that Drexel Burnham secured and 3% to 5% of the total amount of debt or preferred securities of Cardinal that Drexel Burnham sold. *Id.* Drexel Burnham also would receive as compensation $3 million in fees for advising Cardinal and for managing the tender offer. *Id.*

of Cardinal filed disclosure statements with the SEC or with Interco shareholders.[72] Drexel Burnham, however, did not file disclosure statements with the SEC or with Interco shareholders.[73] Contending that Drexel Burnham's failure to file disclosure statements violated the Williams Act, Interco requested the United States District Court for the District of Deleware to enjoin Cardinal's tender offer for Interco stock.[74] After the district court denied Interco's request to enjoin Cardinal's tender offer,[75] Interco appealed the district court's decision to the Third Circuit.[76]

On appeal the Third Circuit in *Interco* considered whether Drexel Burnham was subject to disclosure requirements under the Williams Act and SEC tender offer regulations.[77] Initially, the *Interco* court determined that the fees that Cardinal paid Drexel Burnham to advise Cardinal and to arrange financing for Cardinal's tender offer for Koppers stock were irrelevant to the issue of whether Drexel Burnham must make disclosures to the SEC and to Koppers' shareholders.[78] Noting that Cardinal also gave Drexel Burnham an option to acquire common stock in Cardinal, the Third Circuit determined that Drexel Burnham was a minority investor in Cardinal.[79] The *Interco* court, however, reasoned that Cardinal by giving Drexel Burnham an option to acquire common stock in Cardinal, had not surrendered control of the tender offer to Drexel Burnham.[80] Accordingly, the court in *Interco* considered only whether the Williams Act requires a bidder's minority

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72. *Id.* at 61-62. In *Koppers*, Cardinal, Cardinal Holdings Corp., City Capital Partnership, City GP I, Inc., City GP II, Inc., Steven Rales, and Mitchell Rales filed separate disclosure forms with the SEC on the day that Cardinal commenced the tender offer for Interco stock. *Id.* The disclosure statements that the parties filed disclosed that Drexel Burnham was the subject an SEC civil enforcement action and that Drexel Burnham had received subpoenas from a New York grand jury to testify in the enforcement action. *Id.* at 62.

73. *Id.*

74. *Id.*

75. City Capital Assocs. Ltd. Partnership v. Interco Inc., 696 F. Supp. 1551, 1558 (D. Del. 1988). In denying Interco's request to enjoin Cardinal's tender offer, the district court in *Interco* held that Drexel Burnham was not a bidder. *Id.* The *Interco* district court reasoned that, because Drexel Burnham did not control the bidder, Drexel Burnham was not subject to the disclosure requirements of the Williams Act or the SEC tender offer regulations. *Id.* In determining that Drexel Burnham was not a bidder, the district court in *Interco* acknowledged that by holding an option to purchase between 29% and 36% of Cardinal's common stock, Drexel Burnham was dangerously close to being a bidder under the Williams Act and the SEC tender offer regulations. *Id.*

76. *Interco*, 860 F.2d at 63.

77. *Id.*

78. *Id.*

79. *Id.* at 64. In determining that Drexel Burnham was a minority investor in Cardinal, the *Interco* court assumed that, if Cardinal's tender offer succeeded, Drexel Burnham would exercise the option to purchase 36% of Cardinal's common stock and become a minority investor in Cardinal. *Id.* at 63.

80. *Id.* The court in *Interco* reasoned that, because Capital City retained at least 63% ownership in Cardinal, Capital City and its owners, the Rales brothers, would control the tender offer. *Id.*

shareholder that does not exercise control over a tender offer to make disclosures.[81]

In considering whether a minority investor in a bidder must file disclosure statements with the SEC under the Williams Act, the *Interco* court initially determined that the court should defer to the SEC's interpretation of the Williams Act.[82] The *Interco* court reasoned that Congress entrusted the SEC with interpreting, administrating, and enforcing the federal securities laws.[83] Noting that the SEC tender offer regulations define a bidder as any person who makes a tender offer or on whose behalf a tender offer is made, the *Interco* court acknowledged that a court could interpret the SEC's definition of a bidder to include stockholders of the corporation that makes a tender offer.[84] The court in *Interco*, however, reasoned that the term "bidder" in the SEC tender offer regulations describes only the person or entity that intends to purchase the shares that shareholders tender.[85] The *Interco* court noted that, in the SEC regulations, the SEC distinguishes between the party that intends to purchase the tendered stock (bidder) and a person that owns stock in the bidder.[86] The *Interco* court further noted that, pursuant to the SEC instructions for filing disclosure statements, a person that controls the bidder must file a disclosure statement but does not have to make financial disclosures unless the controlling person's financial condition is material to shareholders' decision in a tender offer.[87] Noting that Drexel Burnham was not the bidder and did not control the bidder, the *Interco* court concluded that the SEC tender offer regulations did not require Drexel Burnham to make disclosures to the SEC or to Interco shareholders.[88] Accordingly, the *Interco* court held that Drexel

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81. *Id.* at 64.

82. *Id.* In *Interco* the Third Circuit determined that courts should defer to the SEC's interpretation of the Williams Act unless the SEC's interpretation conflicts with the mandate of the Williams Act. *Id.*

83. *Id.*

84. *Id.*; *see supra* note 25 and accompanying text (stating SEC's definition of term "bidder").

85. *Interco*, 860 F.2d at 64. The *Interco* court, in interpeting the SEC's definition of the term "bidder", referred to the SEC's instruction for completing a disclosure statement as an example of the SEC's use of the term "bidder". *Id.*; *see* 17 C.F.R. § 240.14d-100 (Item 9 of Special Instructions for Complying with Schd. 14D-1) (1988) (governing bidder's financial disclosures).

86. *Interco*, 860 F.2d. at 64. The *Interco* court reasoned that, because the SEC instructions for complying with Schedule 14D-1 do not identify a bidder as the person that controls the entity making the tender offer, the term "bidder" does not include stockholders of the entity making the tender offer. *Id.*; *see supra* notes 28-30 and accompanying text (discussing SEC disclosure requirements for financial information of bidders and persons that control bidders).

87. *Interco*, 860 F.2d at 64; *see* 17 C.F.R. § 240.14d-100 (Item 9 of Special Instruction for Complying with Schd. 14D-1) (1988) (stating that the controlling entity of a bidder that is not a natural person must file disclosure statement with SEC and target company's shareholders); *supra* notes 25-28 and accompanying text (discussing SEC tender offer regulations).

88. *Interco*, 860 F.2d at 65. In *Interco* the Third Circuit determined that Interco had not proved that Drexel Burnham's financial information was material to Interco shareholders even after Interco had gained access to Drexel Burnham's financial statements through discovery at trial. *Id.*

Burnham's failure to make financial disclosures did not violate the Williams Act and, therefore, affirmed the district court's refusal to enjoin Cardinal's tender offer.[89]

Disagreeing with the majority's interpretation of the Williams Act and the majority's conclusion that Drexel Burnham did not have to file disclosure statements, the dissenting opinion in *Interco* articulated a separate test for determining whether an investment bank that has a minority equity interest in a bidder is subject to the disclosure requirements of the Williams Act and the SEC tender offer regulations.[90] In contrast to the majority's reliance on the SEC's interpretation of the Williams Act, the *Interco* dissenting opinion noted that the language of the Williams Act that governs a tender offeror's duty to disclose information to shareholders of the target company does not include the terms "bidder" or "control".[91] Rather than analyzing the SEC's term "bidder", the dissenting opinion in *Interco* analyzed the text of the Williams Act that requires a person that would be a beneficial owner of more than five percent of the target company's registered stock if the tender offer is successful to make disclosures to the SEC and to the target company's shareholders.[92] The dissenting opinion also noted that the Williams Act delegates to the SEC the authority to require additional information in disclosures, not the authority to decide who must file disclosures.[93] Accordingly, the dissenting opinion maintained that, by using and defining the term "bidder", the SEC could not determine the parties in a tender offer that must file disclosure statements under the Williams Act.[94] The dissenting opinion, therefore, interpreted the SEC's use of the term "bidder" as a general term for those parties participating in a tender offer that the provisions of the Williams Act require to make disclosures.[95]

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89. *Id.*

90. *Id.* at 65-66 (Weis, J., dissenting).

91. *Id.* at 66; *see supra* notes 21-23 and accompanying text (reviewing provisions of Williams Act that describe parties that must make disclosures).

92. *Interco*, 860 F.2d at 66 (Weis, J., dissenting); *see* 15 U.S.C. § 78n(d)(1) (1982 & Supp. IV 1986) (requiring any person in tender offer that, upon consummation of tender offer, would be beneficial owner of more than 5% of class of target company's registered stock to make disclosures to SEC).

93. *Interco*, 860 F.2d at 66 (Weis, J., dissenting); *see supra* note 24 and accompanying text (stating provision of Williams Act that delegates authority to SEC to require specific disclosure information).

94. *Interco*, 860 F.2d at 66 (Weis, J., dissenting).

95. *Id.* In *Interco* the dissenting opinion stated that a court should attempt to interpret administrative agencies' regulations as not conflicting with federal statutes. *Id.* Accordingly, in interpreting the SEC's definition of "bidder" as a general term for a person in a tender offer that must make disclosures, the dissenting opinion in *Interco* read the term "bidder" in the SEC regulations in harmony with the language of the Williams Act. *Id.* The dissenting opinion reasoned that, if the majority's interpretation of the term "bidder" is correct, the SEC regulations conflict with the language of the Williams Act. *Id.* The dissenting opinion in *Interco* explained that the majority's interpretation of the term "bidder" narrows the Williams Act's scope by not requiring some parties to make disclosures that the Williams Act requires to make disclosures. *Id.* The dissenting opinion in *Interco*, therefore, determined that if the SEC's definition of the term "bidder" narrowed the scope of the Williams Act, the SEC had exceeded the authority that Congress granted the SEC in the Williams Act. *Id.*

After maintaining that the SEC lacked the authority to define the parties in a tender offer that must make disclosures, the dissenting opinion in *Interco* analyzed the legislative history of the Williams Act to determine Congress' intent in regulating tender offers.[96] The dissenting opinion reasoned that Congress, in enacting the Williams Act, intended to require persons that make a tender offer to gain control of a company to make disclosures to shareholders of the target company.[97] The dissenting opinion, in contrast to the majority's reasoning in *Interco*, reasoned that the language and legislative history of the Williams Act do not indicate that Congress only intended an entity that controls or dominates the entity making the tender offer to make disclosures.[98] The dissenting opinion maintained that Congress was concerned with requiring disclosures from all parties that acquire, by any means, benficial ownership of a company's registered stock.[99] Noting that requiring disclosure from all parties that combine to make a tender offer sometimes may be excessive, the dissenting opinion, nonetheless, reasoned that the effect on shareholders from receiving excessive information would be harmless.[100] The dissenting opinion in *Interco*, however, reasoned that inadequate disclosure in a tender offer could harm shareholders of the target company.[101] Accordingly, the dissenting opinion maintained that, to determine which parties in a tender offer must make disclosures under the Williams Act, a court should consider whether a party would have beneficial

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96. *Id.*

97. *Id.* at 66-67. In analyzing the legislative history of the Williams Act, the dissenting opinion in *Interco* determined that Congress intended that the term "person" have the same meaning in the Williams Act's tender offer provisions as in the provision of the Williams Act that requires disclosure from a "person" that receives beneficial ownership of more than a certain percentage of the common securities in a publicly held company through purchases in the stock market. *Id.* at 66; *see also* H.R. REP. No. 1711, *supra* note 3, at 2818 (discussing intent of Congress in defining "person" in Williams Act); *compare* 15 U.S.C. § 78n(d)(1) (1982 & Supp. IV 1986) (requiring person that would acquire beneficial ownership of more than 5% of class of target company's registered stock upon consummation of tender offer to file disclosures) *with* 15 U.S.C. § 78m(d)(1) (1982 & Supp. IV 1986) (requiring person that acquires beneficial ownership of more than 5% of class of company's registered stock to make disclosures).

98. *Interco*, 860 F.2d at 68 (Weis, J., dissenting). *But see supra* notes 86-90 and accompanying text (discussing *Interco* court's reasoning that, under the Williams Act, only bidder and entity that controls bidder must make disclosures to SEC and target company shareholders).

99. *Interco*, 860 F.2d at 68 (Weis, J., dissenting). In maintaining that Congress intended to require disclosures from all parties that combine to make a tender offer, the dissenting opinion in *Interco* referred to the legislative history of the Williams Act that states that the Williams Act provides for full disclosure of the identity of any person that acquires more than 10% of a company's registered stock. *Id.*; *see* H.R. REP. No. 1711, *supra* note 3, at 2814 (intending to make disclosure requirements for tender offers like disclosure requirements in proxy contests).

100. *Interco*, 860 F.2d at 68 (Weis, J., dissenting).

101. *Id.* Maintaining that inadequate disclosure could harm shareholders, the dissenting opinion in *Interco* interpreted the Williams Act's disclosure provisions liberally to allow shareholder to receive informations from all parties that combine to make a tender offer. *Id.*

ownership of stock in the target company if the tender offer succeeds (beneficial ownership test).[102]

After articulating the beneficial ownership test for determining whether a party to a tender offer must make disclosures to the SEC and to shareholders of the target company, the dissenting opinion in *Interco* considered whether Drexel Burnham was a beneficial owner of Interco stock and, therefore, subject to disclosures requirements of the Williams Act.[103] The dissenting opinion determined that because Drexel Burnham had the option to purchase common equity of the acquiring company in Cardinal's tender offer, Drexel Burnham was a beneficial owner of Interco stock.[104] Accordingly, the dissenting opinion maintained that, as a beneficial owner, Drexel Burnham must make disclosures to the SEC and to Interco shareholders.[105] The dissenting opinion, however, did not determine whether financial information from Drexel was material to Interco shareholders.[106] The *Interco* dissenting opinion, therefore, in maintaining that Drexel Burnham is subject to the disclosure requirements under the Williams Act, contended that the majority should have remanded the case to district court for a determination on whether financial information from Drexel Burnham is material to Interco shareholders.[107]

IV. *Comparision of Control Test, Principal Participant Test and Beneficial Ownership Test*

The *Interco* dissenting opinion, the *Interco* majority opinion, and the *Koppers* court's decision present three different tests for determining whether an investment bank that participates in a tender offer must make disclosures under the Williams Act.[108] First, the dissenting opinion in *Interco* presents a beneficial ownership test to determine whether an investment bank that participates in a tender offer must file a disclosure statement.[109] Under the

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102. *Id.*

103. *Id.* at 69-70.

104. *Id.* at 69. In addition to determining that Drexel Burnham was a beneficial owner of Interco stock, the dissenting opinion in *Interco* determined that Drexel Burnham played a critical role in Cardinal's tender offer for Interco stock. *Id.* The dissenting opinion reasoned that Drexel Burnham's option to purchase common stock in Cardinal demonstrated the importance of Drexel Burnham's role of arranging financing for Cardinal's tender offer. *Id.*

105. *Id.* at 69.

106. *Id.*

107. *Id.* at 70. In determining that the majority should have remanded the issue of whether Drexel Burnham's financial information is material to Interco shareholders, the dissenting opinion in *Interco* reasoned that materiality of financial information is a factual issue. *Id.*

108. City Capital Assocs. Ltd. Partnership v. Interco Inc., 860 F.2d 60, 65-70 (3d Cir. 1988) (Weiss, J., dissenting); *Interco*, 860 F.2d at 64-65; Koppers v. American Express Co., 689 F. Supp. 1371, 1388-1390 (W.D. Pa. 1988); *see supra* notes 51, 87-88, 96 and accompanying text (discussing courts' tests for determining whether investment bank that had equity investment in bidding corporation must make disclosures to SEC and to target company's shareholders).

109. *Interco*, 860 F.2d at 65-68 (Weis, J., dissenting); *see supra* notes 99-102 and accompanying text (discussing *Interco* dissent's beneficial ownership test).

beneficial ownership test, if an investment bank that invests in a bidder would own more than five percent of the target company's registered stock upon consummation of the tender offer, the investment bank must make disclosures to the SEC and to the target company's shareholders.[110] Second, the majority in *Interco* presents a control test.[111] Under the control test, an investment bank that owns the control block of stock of the tender offeror must make disclosures to the SEC and to the target company shareholders.[112] Third, the district court's decision in *Koppers* presents the principal participant test to determine whether an investment bank that participates in the tender offer must make disclosures.[113] Under the principal participant test, an investment bank is not subject to the Williams Act's disclosure requirements unless the investment bank has an equity interest in the bidder and plays a significant role in forming and financing the bidder.[114] The beneficial ownership test, the control test, and the principal participant test purport to make the requirement for financial disclosures from an investment bank subject to the materiality of the information to the shareholders' decisions whether to tender or to retain shares in the target company.[115] Moreover, a court can apply each test to all parties that combine to form the entity that actually makes the tender offer.[116] In application, however, only the beneficial ownership test conforms to the language of the Williams Act and

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110. *See supra* notes 109-110 and accompanying text (discussing *Interco* dissenting opinion's determination that Drexel Burnham must make disclosures).

111. *Interco*, 860 F.2d at 64-65; *see supra* note 88 and accompanying text (discussing court's holding in *Interco* that Drexel Burnham was not bidder because Drexel Burnham did not control tender offer).

112. *See supra* note 87 and accompanying text (discussing *Interco* majority's interpretation of SEC regulations that require person that controls bidder to make disclosures).

113. Koppers v. American Express Co., 689 F. Supp. 1371, 1388-1390 (W.D. Pa. 1988); *see supra* note 51 and accompanying text (discussing *Koppers* court determination that parties playing important role in forming and capitalizing bidder are subject to disclosure requirements of Williams Act).

114. *See Koppers*, 689 F. Supp. at 1390 (determining that, because Shearson Lehman significantly participated in forming and capitalizing bidder, BNS, Inc., Shearson Lehman must make disclosures to SEC and Koppers' shareholders).

115. *See supra* note 61 and accompanying text (discussing *Koopers* court's determination that financial information from investment bank would be material to target company's shareholders); *supra* note 88 and accompanying text (discussing *Interco* majority's determination that plaintiff failed to show financial information from investment bank was material to target company's shareholders); *supra* note 105-106 and accompanying text (discussing *Interco* dissenting opinion's reasoning that Third Circuit should remand case to district court for determination of materiality of investment bank's financial information).

116. *See supra* note 51 and accompanying text (stating that *Koppers* court analyzed activities of persons that created bidding entity in tender offer to determine which parties must make disclosures under Williams Act); *supra* note 87 and accompanying text (discussing *Interco* majority's reasoning that person that controlled entity making a tender offer must make disclosures under Williams Act); *supra* note 98 and accompanying text (discussing *Interco* dissenting opinion's reasoning that Congress intended all parties that combined to make tender offer to make disclosures under Williams Act).

promotes the policies that Congress intended to promote in enacting the Williams Act.[117]

The *Interco* majority's control test does not conform to the language of the Williams Act and does not promote the policies that Congress intended to promote in enacting the Williams Act.[118] The *Interco* majority, instead of analyzing the text of the Williams Act, deferred to the SEC's interpretation of the Williams Act as expressed in the SEC's tender offer regulations.[119] In deferring to the SEC's interpretation of the Williams Act, the *Interco* majority only analyzed the instructions that the SEC provides persons that are filing a disclosure statement.[120] The SEC filing instructions state that only the bidder or person that controls the bidder must file a disclosure statement.[121] The language of the Williams Act, however, does not indicate that only the dominant or controlling party of the entity that makes a tender offer must make disclosures.[122] Instead, the language of Williams Act states that any person that would be the beneficial owner of more than five percent of the target company's registered stock must make disclosures.[123] Moreover, the language of the Williams Act only empowers the SEC to decide the specific information that a bidder must disclose, not which parties in a tender offer must make disclosures.[124] The majority in *Interco* should have examined the text of the Williams Act and should have determined that any SEC attempt to limit the parties in a tender offer that must make disclosures under the Williams Act exceeded the SEC's authority.[125]

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117. *See infra* notes 118-154 and accompanying text (analyzing beneficial ownership test, control test, and principal participant test).

118. *See infra* notes 119-133 and accompanying text (analyzing *Interco* majority's control test).

119. *Interco*, 860 F.2d at 64; *see supra* notes 83-85 and accompanying text (discussing *Interco* majority's deference to SEC's instruction for disclosure statement form); *supra* notes 24-28 and accompanying text (discussing SEC regulations that govern which parties in tender offer must make disclosures).

120. *See Interco*, 860 F.2d at 64-65 (analyzing SEC's instructions for content of disclosure statements).

121. 17 C.F.R. § 240.14d-100 (1988) (Item 9 of Special Instructions for Complying with Sch. 14D-1); *see supra* notes 24-26 and accompanying text (discussing SEC instructions on which parties must file disclosure statement with SEC).

122. 15 U.S.C. § 78n(d)(1) (1982 & Supp. IV 1986); *see supra* notes 21-22 and accompanying text (discussing language of Williams Act that identifies parties that must make disclosures).

123. 15 U.S.C. § 78n(d)(1) (1982 & Supp. IV 1986); *see supra* notes 21-22 (discussing language of Williams Act that identifies parties that must make disclosures).

124. 15 U.S.C. § 78n(d)(1) (1982 & Supp. IV 1986); *see supra* note 23 (discussing language of Williams Act that authorizes SEC to determine specific information that bidder must disclose to protect shareholders of target company and public).

125. *See supra* notes 121-124 and accompanying text (discussing language of Williams Act and authority that Williams Act grants SEC); *see generally* International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 566 n.20, (1979) (reasoning that courts should not defer to SEC when SEC's position is in conflict with language and purpose of statute); Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930, 936 (2d Cir. 1986) (reasoning that

In addition to failing to conforming to the language of the Williams Act, the *Interco* majority's control test does not promote the policies that Congress intended to promote in enacting the Williams Act.[126] Congress enacted the Williams Act because Congress was concerned that shareholders of a target company were not receiving information that was material to the shareholder's decision whether to tender or to retain shares in the target company.[127] Congress reasoned that disclosures from all parties that would obtain beneficial ownership of registered stock from a successful tender offer were material to a shareholder's evaluation of a bidder's tender offer.[128] Under the *Interco* majority's control test, however, an investment bank that is a minority investor in a entity making a tender offer, such as Drexel Burnham in *Interco*, could evade the Williams Act's disclosure requirements.[129] The *Interco* court's interpretation of the SEC instructions as requiring only the controlling person of the bidder to make disclosures, therefore, frustrates Congress' intent to require all persons that would aquire beneficial ownership of the target company's stock to make disclosures to the SEC and to shareholders of the target company.[130]

The *Interco* court, facing a possible conflict between the stated legislative purpose of a statute and an administrative agency's regulations, should have attempted to interpret the SEC tender offer regulations in harmony with the Williams Act and thus have avoided the conflict.[131] The *Interco* court

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courts should uphold SEC's regulations and interpretations of federal security laws only when SEC's regulations and interpretations are consistent with purpose of statute and have rational basis).

126. *See infra* notes 127-130 and accompanying text (analyzing control test's failure to promote policies of Williams Act).

127. *See* H.R. REP. No. 1711, *supra* note 3, at 2812-13 (intending that Williams Act would provide shareholders in tender offer with all relevant facts, including identity of participants in tender offer so shareholders could make informed investment decision); *see also supra* notes 5-6 and accompanying text (discussing legislative history of Williams Act).

128. *See* H.R. REP. No. 1711, *supra* note 3, at 2813 (stating that, if shareholders of target company received information from all persons that sought control of target company, information may affect shareholders's opinion on tender offer). In enacting the Williams Act, Congress reasoned that, by requiring all persons that sought control of a company through a tender offer to make disclosures, shareholders could assess the company's future and the probability that the tender offer would be successful. *Id.* at 2812; *see also supra* notes 5-6, 21-22 and accompanying text (discussing language and legislative intent of Williams Act).

129. *See supra* note 87-89 (discussing *Interco* majority determination that Williams Act and SEC tender offer regulations did not require Drexel Burnham, minority investor in entity that made tender offer, to make disclosures).

130. *Compare supra* note 129 and accompanying text (discussing that under *Interco* majority's control test, minority investor in bidder can escape disclosure requirements of Williams Act) *with supra* note 6 (discussing legislative history of Williams Act that indicates Congress enacted Williams Act to require full disclosure from person that beneficially would own registered stock through contract or other arrangement).

131. *See* City Capital Assocs. Ltd. Partnership v. Interco Inc., 860 F.2d 60, 64 (3d. Cir. 1988) (reasoning that *Interco* court should defer to SEC tender offer regulations unless regulations conflict with congressional mandate of Williams Act); *Id.*, at 66 (Weis, J., dissenting) (reasoning that *Interco* court should interpret SEC tender offer regulations to not conflict with Williams Act).

could have avoided a conflict between legislative intent and administrative agency's interpretation of the Williams Act by determining that the SEC instruction for complying with the disclosure statement was not the SEC's interpretation of the Williams Act but only an aid to parties that must make disclosures under the Williams Act.[132] In interpreting the legislative history and language of the Williams Act, the *Interco* court should have emphasized Congress' intent in enacting the Williams Act rather than deferring to SEC instructions for completing a disclosure form as the SEC's interpretation of the Williams Act.[133]

Similar to the *Interco* majority's control test, the *Koppers* court's principal participant test is inconsistent with the language and the policies of the Williams Act.[134] In applying the principal participant test, the *Koppers* court evaluated the nature and degree of an investment bank's activity in the formation and capitalization of a bidder to determine if the investment bank must file a disclosure statement with the SEC.[135] Specifically, under the the *Koppers* court's principal participant test, a party participating in a tender offer must make disclosures to the SEC and the target company's shareholders only if the party has a direct equity investment in the bidder and plays a central role in forming and capitalizing the bidder.[136] The text of the Williams Act, however, states that beneficial ownership of more than five percent of a target company's securities, not the level of the party's activities in the tender offer, is the trigger for requiring disclosures from a party in a tender offer.[137] Accordingly, by emphasizing the nature and degree of a party's participation in a tender offer instead of the party's potential beneficial ownership of the target company's stock, the principal participation test fails to conform to the language of the Williams Act.[138]

In addition to failing to conform to the language of the Williams Act, the principal participant test frustrates the policies underlying the Williams

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132. *See id.* at 66 (Weis, J., dissenting) (reasoning that *Interco* court could have interpreted term "bidder" under SEC tender offer regulations as general term for person under Williams Act); *see supra* note 95 and accompanying text (discussing *Interco* dissenting opinion's interpretation of SEC's term "bidder").

133. *See supra* notes 121-124 (discussing differences between Williams Act and SEC tender offer regulations); *supra* note 130-132 and accompanying text (discussing *Interco* majority's decision to defer to SEC's interpretation of Williams Act only if SEC's interpretation is not in conflict with congressional mandate of Williams Act).

134. *See infra* notes 135-138 and accompanying text (analyzing principal participant test).

135. *See* Koppers v. American Express Co., 689 F. Supp. 1371, 1388-1390 (W.D. Pa. 1988) (analyzing Shearson Lehman's activities in forming and capitalizing bidder, BNS, Inc.); *see also supra* note 51 and accompanying text (discussing *Koppers* court's analysis of investment bank's activities in tender offer to determine if investment bank must make disclosures).

136. *See Koppers*, 689 F. Supp. at 1390 (determining that because Shearson Lehman played important role in forming and capitalizing bidder, Shearson Lehman must make disclosures to SEC and to Koppers' shareholders).

137. *See* 15 U.S.C. § 78n(d)(1) (1982 & Supp. IV 1986) (requiring all persons that would receive beneficial ownership of more than 5% of company's registered stock upon successful tender offer to make disclosures to SEC and target company's shareholders).

138. *See supra* notes 134-36 and accompanying text (discussing conflict between principal participant test and language of Williams Act).

Act.[139] In enacting the Williams Act, Congress intended to require all parties that seek to gain control of a company through a tender offer to make disclosures to the SEC and to the company's shareholders.[140] In requiring all parties that participate in a tender offer to make disclosures, Congress intended to assure that, before the terms of a tender offer forced shareholders to make a decision, shareholders of the target company would receive information concerning the persons that would own more than five percent of the target company if the tender offer succeeded.[141] The *Koppers* court's principal participant test, however, would require only the parties that have significant roles in forming and capitalizing the entity that makes the tender offer to disclose information to the SEC and to the target company's shareholders.[142] By requiring only the principal participants in a tender offer to make disclosures, the principal participant test would not provide shareholders with all the information that Congress intended the target company shareholders to receive.[143] The principal participant test, therefore, frustrates the full disclosure policy of the Williams Act.[144]

In contrast to the control test and the principal participant test, the *Interco* dissenting opinion's beneficial ownership test is consistent with the language and policies of the Williams Act.[145] The *Interco* dissenting opinion correctly noted that the Williams Act does not contain language which provides that only the dominant or controlling entities in a tender offer are subject to the disclosure requirements.[146] In articulating the beneficial own-

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139. *See infra* notes 140-44 and accompanying text (comparing principal participant test and policies underlying Williams Act).

140. H.R. REP. No. 1711, *supra* note 3, at 2813. In enacting the Williams Act, Congress intended to provide the same disclosure requirements in tender offers as required in proxy contests. *Id.* In regulating proxy contests, Congress requires disclosure filings to inform shareholders of the identity of the participants and the participants' associates. *Id.* Congress, in enacting the Williams Act, therefore, intended to inform shareholders of the target company with the identity of the persons that combined to make a tender offer. *Id.* at 2814; *see* Electronic Specialty Co. v. International Controls Corp. 409 F.2d 937, 945 (2d Cir. 1969) (analogizing tender offer regulations to proxy contest regulations).

141. *See* H.R. REP. No. 1711, *supra* note 3, at 2813 (intending that shareholders receive information concerning persons that combine to make tender offer so shareholders could make informed investment decision); *see also supra* notes 5-6 and accompanying text (discussing legislative history of Williams Act).

142. *See* Koppers Co. v. American Express Co., 689 F. Supp. 1371, 1388-90 (W.D. Pa. 1988) (presenting principal participant test).

143. *Compare supra* note 141 and accompanying text (discussing Congress' intent that all persons that wold receive beneficial ownership of more than 5% of target company's registered stock upon successful tender offer to make disclosures) *with supra* note 142 and accompanying text (discussing parties that must make disclosures under principal participant test).

144. *See supra* notes 141-43 and accompanying text (discussing conflict between principal participant test and Congress' intent in enacting Williams Act).

145. *See infra* notes 146-48 and accompanying text (analyzing *Interco* dissenting opinion's beneficial ownership test).

146. *See* City Capital Assocs. Ltd. Partnership v. Interco Inc., 860 F.2d 60, 68 (Weis, J., dissenting) (3d Cir. 1988) (analyzing language of Williams Act); *see also supra* note 91-92 and accompanying text (discussing *Interco* dissenting opinion's reasoning that Williams Act

ership test, the *Interco* dissenting opinion directly cited the language of the Williams Act which states that a person that would own more than five percent of the target company's stock upon a successful tender offer is subject to the disclosure requirements of the Williams Act.[147] Accordingly, by requiring disclosure from any person in a tender offer, including an investment bank, that would own more than five percent of the target company's stock upon a succeessful tender offer, the beneficial ownership test conforms to the language of the Williams Act.[148]

In addition to conforming to the language of the Williams Act, the beneficial ownership test promotes the policies that Congress intended to promote in enacting the Williams Act.[149] Congress, in enacting the Williams Act, intended to prevent a group of persons that formed an entity in a tender offer from evading disclosures to shareholders.[150] In particular, Congress intended to protect shareholders of target companies by requiring full disclosure from persons that would own a portion of the target company's stock upon the successful completion of the tender offer.[151] Congress reasoned that shareholders would need information from the potential owners to evaluate the potential owners' impact on the future of the company.[152] Accordingly, the beneficial ownership test requires disclosures to shareholders from all participants in a tender offer that would own more that five percent of the target company's stock upon a successful tender offer.[153] The *Interco* dissent's beneficial ownership test, therefore, in requiring an investment bank that holds an option to purchase common stock

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did not limit disclosure requirement to entity that makes tender offer or to party that controls bidder).

147. *See Interco*, 860 F.2d at 66 (Weis, J., dissenting) (citing to 15 U.S.C. § 78n(d)(1)); *see also* 15 U.S.C. § 78n(d)(1) (1982 & Supp. 1986) (requiring person that, upon successful tender offer, would be beneficial owner of more than 5% of target company's registered stock to make disclosures to SEC).

148. *See supra* notes 146-47 and accompanying text (comparing beneficial ownership test with language of Williams Act); *see also supra* notes 99-102 and accompanying text (discussing *Interco* dissenting opinion's application of beneficial ownership test).

149. *See infra* notes 150-53 and accompanying text (comparing beneficial ownership test to legislative history of Williams Act).

150. *See* H.R. REP. No. 1711, *supra* note 3, at 2813 (reasoning that persons making tender offers should not be exempt from disclosing information to SEC and target company's shareholders); *see supra* note 99 and accompanying text (discussing *Interco* dissenting opinion's analysis of congressional intent in enacting Williams Act).

151. *See* H.R. REP. No. 1711, *supra* note 3, at 2814 (intending that any person or group that would acquire more than 5% of target company's registered stock to make disclosures); Piper v. Chris-Craft Indus., 430 U.S. 1, 28 (1976) (noting that Congress enacted Williams Act to protect shareholders of target companies from persons that operated covertly in making tender offers); *see also supra* notes 5-6 and accompanying text (discussing legislative history of Williams Act).

152. *See* H.R. REP. No. 1711, at 2812-13 (discussing target company's shareholders need for disclosures from parties that make tender offer to make informed decision); *see also supra* notes 5-6 and accmpanying text (discussing legislative history of Williams Act).

153. *See supra* notes 99-102 and accompanying text (discussing *Interco* dissenting opinion's application of beneficial ownership test).

in a shell bidding company to disclose information to shareholders of the target companies promotes the policies behind the enactment of the Williams Act.[154]

V. *Conclusion*

In 1968 Congress enacted the Williams Act to ensure that shareholders of a company that was the target of a tender offer received information that enabled the shareholders to make an informed investment decision.[155] Recently, two federal courts have analyzed the issue of whether the Williams Act requires an investment bank that has an equity investment in a company making a tender offer to make disclosures to the SEC and the shareholders of the target company.[156] The courts, in analyzing the investment bank's activities, have formulated three different tests for determining whether the investment bank must make disclosures.[157] Because the securities industry and the takeover market rely on uniformity and consistency to function efficiently, courts need to adopt a single test.[158] The principal participant test that the *Koppers* court formulated does not conform to the language or the legislative history of the Williams Act.[159] Likewise, the control test that the majority in *Interco* formulated does not rely on the Williams Act but rather incorrectly relies on SEC instructions to parties that file a disclosure statement.[160] The *Interco* dissenting opinion's beneficial ownership test is the only test that conforms to the language and the legislative history of the Williams Act.[161] Because of the confusion that the SEC tender offer regulations have caused in the courts' analyses of which parties are subject to the disclosure requirements of the Williams Act, the SEC should codify the beneficial ownership test.[162] Accordingly, by promulgating rules that codify the beneficial ownership test, the SEC will promote the policies that Congress intended to promote in enacting the Williams Act and will resolve the confusion that currently exists within the judiciary's analyses of an

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154. *See supra* notes 150-53 and accompanying text (comparing beneficial ownership test with legislative history of Williams Act).

155. *See supra* notes 1-7 and accompanying text (discussing purpose of Williams Act).

156. *See supra* note 32 and accompanying text (noting courts that have addressed issue of whether Williams Act required investment banks that were equity participants in bidder to make disclosures to SEC).

157. *See supra* notes 47-69 and accompanying text (discussing *Koppers* court's principal participant test); *supra* notes 82-89 and accompanying text (discussing *Interco* majority's control test); *supra* notes 91-107 and accompanying text (discussing *Interco* dissenting opinion's beneficial ownership test).

158. *See supra* note 18 and accompanying text (discussing need for predictibility in federal securities laws).

159. *See supra* notes 134-44 and accompanying text (analyzing principal participant test).

160. *See supra* notes 118-33 and accompanying text (analyzing control test).

161. *See supra* notes 145-54 and accompanying text (analyzing beneficial ownership test).

162. *See supra* note 18 and accompanying text (discussing need for predictibility in federal securities laws); *supra* notes 145-54 and accompanying text (analyzing *Interco* dissenting opinion's beneficial ownership test).

investment bank's duty to disclose information in a tender offer.[163]

Roger Alsup

ADDENDUM

On March 29, 1989, the United States Court of Appeals For the First Circuit adopted the *Interco* dissenting opinion's reasoning that an investment bank that stands to receive beneficial ownership of more than five percent of a target company's stock is a bidder for disclosure purposes under the Williams Act. *MAI Basic Four, Inc. v. Prime Computer, Inc.*, 871 F.2d 212, 219 (1st Cir. 1989). In *Prime Computer* the First Circuit stated "The more flexible, fact-based approach advocated by Judge Weis is consistent with our reading of the Williams Act." *Id.* The court in *Prime Computer*, therefore, determined that an investment bank that had a right to acquire fourteen percent of the target company upon completion of the tender offer was a bidder subject to the disclosure requirements of the Williams Act and the SEC tender offer regulations. *Id.* at 221.

163. *See supra* notes 15, 18-19, 162 and accompanying text (reasoning that SEC should codify beneficial ownership test).