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ARTIFICIALLY AFFECTING MARKET ACTIVITY THROUGH LOCK-UP AGREEMENTS—MANIPULATION UNDER SECTION 14(e): DATA PROBE ACQUISITION CORP. V. DATATAB, INC.

Section 14(e) of the Williams Act (the Act)\(^1\) prohibits any person from "engag[ing] in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer."\(^2\) In light of section 14(e), some courts and commentators recently have questioned the validity of various defensive tactics\(^8\) employed by target companies.

\(^1\) 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982).
\(^2\) Id. § 78n(e). Section 14(e) of the Williams Act provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in 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.


\(^8\) The board of directors of a target company may employ various tactics to oppose an unfriendly or unsolicited bid. 1 A. Fleischer, Jr., Tender Offers: Defenses, Responses, and Planning 291 (1983). Defensive actions that may be undertaken include communications campaigns with shareholders, placement of stock in friendly hands, execution of a defensive merger with a white knight, institution of legal proceedings, increases in outstanding stock, dividend increases, stock splits, corporate purchase of its own shares, acquisitions to create antitrust problems, creation of contractual obstacles, charter and bylaw amendments,
management to defeat hostile takeover bids. In particular, lock-up options, which permit the purchase of a substantial percentage of a corporation's stock or assets, and which are granted by target management to one tender offeror, have been challenged by competing tender offerors as "manipulative acts or practices" under this section. Recently, in Data Probe Acquisition Corp. v. Datatab, Inc., the Court of Appeals for the Second Circuit refused to enjoin a 1-year option granted by target management to a competing tender offeror for shares equivalent to 200% of the target's outstanding stock, and held that section 14(e) of the Williams Act did not empower federal courts "to review the substantive validity of corporate actions undertaken during the course of a tender offer."

In Data Probe, Data Probe Acquisition Corporation (Data and sale of attractive assets. Id. at 297-387; 1 M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZOUTS 271-305 (1978); Stanford Note, supra note 2, at 1109-26.

4 See, e.g., Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 374 (6th Cir. 1981); see also Lynch & Steinberg, The Legitimacy of Defensive Tactics in Tender Offers, 64 CORNELL L. REV. 901, 911 (1979) (disclosure is of little value if target management effectively can deprive stockholders of their choice); Weiss, Defensive Responses to Tender Offers and the Williams Act's Prohibition Against Manipulation, 35 VAND. L. REV. 1087, 1128-29 (1982) (arrangements effectuating artificial market conditions are manipulative for purposes of section 14(e)); cf. Whittaker Corp. v. Edgar, 535 F. Supp. 933, 949 (N.D. Ill. 1982) (no § 14(e) violation since target management's actions did not create artificial price ceiling and hence did not produce an absolute lock-up of the kind that confronted the Marathon court). The majority of courts, however, have persisted in interpreting section 14(e) as affording strictly procedural safeguards against disclosure violations. See infra note 37 and accompanying text.

5 Lock-ups are made in conjunction with a proposed offer, and provide the offeror an advantage over potential or competing bidders. Fraidin & Franco, Lock-Up Arrangements, 14 REV. SEC. REG. 821, 821 (1981). A lock-up increases an offeror's possibility of success, creates obstacles for other competitors, id., and permits the bidder to maintain his original price, Note, The Future of Lock-Ups After Mobil v. Marathon Oil, 27 ST. LOUIS U.L.J. 261, 265 (1983). In addition, lock-ups provide target companies with advantages in negotiating with white knights when one is sought in response to a hostile tender offer. Note, Lock-Up Options: Toward a State Law Standard, 96 HARP. L. REV. 1068, 1068 (1983) [hereinafter cited as Harvard Note]; Note, supra, at 266. Typical of the lock-up arrangements granted to friendly offerors or white knights by target management were those granted in Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 367 (6th Cir. 1981) (stock option and purchase option for "crown jewel" asset). For a discussion of the Marathon options and their ramifications, see infra note 19.


8 Id. at 4.
Probe) announced a cash tender offer for the stock of Datatab, Incorporated (Datatab) at $1.25 per share, conditioned on the failure of an earlier announced merger proposal between Datatab and CRC Acquisition Corporation (CRC). Under that agreement, CRC would initiate a tender offer at $1.00 per share, upon completion of which Datatab would be merged into a wholly-owned subsidiary of CRC. In addition, three of Datatab's officer-directors were to be signed to 3-year employment contracts with CRC. After unsuccessful negotiations with the president of Data Probe, intended to secure personal employment contracts similar to those stipulated in the CRC agreement, the Datatab directors conducted further negotiations with CRC which resulted in a revised merger agreement. The second proposed merger included a price increase for shareholders from $1.00 to $1.40 per share and granted CRC an irrevocable 1-year option to purchase 1,407,674 authorized but unissued shares at the same price. Data Probe countered with an offer of $1.55 per share, contingent on the invalidation of the CRC option. Thereafter, Data Probe sought to enjoin CRC from exercising its option, alleging that the option constituted a manipula-

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9 Id. at 2-3. Datatab scheduled a shareholders' meeting to obtain two-thirds approval of the merger as required by New York law. Id. at 2. Two days before the scheduled meeting, Data Probe announced its tender offer. Id.


11 Id.

12 Id. at 1542. After Data Probe announced its tender offer, a meeting was arranged between Yitzhak Bachana, president of Data Probe, and Sanford Adams, president of Datatab. Id. During their negotiations, Adams inquired as to the employment arrangements Bachana would be willing to make in regard to Datatab's officers. Id. The trial record indicated that Bachana was willing to consider salaries comparable to those agreed to by CRC, but considered a commitment on a specific figure or duration of employment premature. Id. Testimony at the trial indicated that Adams would have been cooperative in a takeover attempt only if he received the contract guarantees he sought. Id.

13 722 F.2d at 3.

14 Id. If exercised, the option would invest CRC with two-thirds majority control of Datatab regardless of the number of shares tendered to Data Probe by Datatab shareholders. Id.

15 Id. at 2. The court assumed without deciding that a tender offeror has standing to seek injunctive relief against the target company or other competitors in the tender offer contest, reasoning that such a determination would not affect the outcome of the case. Id. at 4 n.2. Whether a tender offeror has standing to seek injunctive relief under section 14(e) has not been addressed by the Supreme Court. See Piper v. Chris-Craft Indus., 430 U.S. 1, 47 n.33 (1977). In Piper, the Court held that there was no implied action for damages for a tender offeror since the Act was intended to provide protection only for investors. Id. at 35. The Court, however, offered "no view upon whether as a general proposition a suit in equity for injunctive relief, as distinguished from an action for damages, would lie in favor of a
tive act or practice in violation of section 14(e) of the Williams Act.\textsuperscript{18}

The district court granted Data Probe’s request to enjoin the option agreement.\textsuperscript{17} Judge Sofaer, relying on the Sixth Circuit’s interpretation of the phrase “manipulative device” in \textit{Mobil Corp. v. Marathon Oil Co.}\textsuperscript{18} as a defensive tactic that “not only artificially affect[s], but for all practical purposes completely block[s], normal healthy market activity,”\textsuperscript{19} concluded that the option was manipulative within the meaning of the Act because it directly interfered with the shareholders’ right to tender their shares freely in the market, effectively terminating all further bidding.\textsuperscript{20}

On appeal, the Second Circuit reversed, stating that the technical definition given to manipulation in the context of section
10(b) and Rule 10b-5—"artificially affecting market activity in order to mislead investors"—was equally applicable to section 14(e). Judge Winter reasoned that federal jurisdiction under section 14(e) did not extend to claims that target management took action during a tender offer that foreclosed a competitive market, since such conduct pertains to the fairness of a transaction, and is subject, therefore, solely to traditional state-law fiduciary standards. The court, rejecting Marathon as an "unwarranted extension of the Williams Act," concluded that, absent misrepresentation, a cause of action under section 14(e) based on corporate actions during a tender offer does not lie. Accordingly, the court reasoned, the fairness or unfairness of a particular corporate action taken during a tender offer, such as granting a stock or asset option, was irrelevant to an analysis of manipulation.

21 Santa Fe Indus. v. Green, 430 U.S. 462, 477 (1977). The Santa Fe Court, describing manipulation as "virtually a term of art when used in connection with securities markets," id. at 476 (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976)), stated that the term referred to specific practices "such as wash sales, matched orders, or rigged prices," that are intended to defraud or mislead investors by "artificially affecting market activity," id.

22 722 F.2d at 4 (citing Billard v. Rockwell Int'l Corp., 683 F.2d 51, 56 (2d Cir. 1982)).

23 722 F.2d at 4. The court's decision to deny federal jurisdiction was based primarily on the Supreme Court's holding in Santa Fe Indus. v. Green, 430 U.S. 462 (1977). See id. In Santa Fe, minority stockholders of Kirby Lumber Corp. brought an action under § 10(b) and Rule 10b-5 of the Securities and Exchange Act of 1934 against Santa Fe Industries, Inc., a 95% majority shareholder, alleging fraud in the execution of a short-term merger and seeking to set aside the merger or receive a fair value for their shares. 430 U.S. at 465-67. Plaintiffs alleged that the merger was intended to freeze out the minority shareholders "at a wholly inadequate price," and that Santa Fe knowingly obtained a fraudulent appraisal of the stock from an independent investment banking firm. Id. at 467. The Court held, however, that § 10(b) did not apply to "instances of corporate mismanagement . . . in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary." 430 U.S. at 477. In line with the Supreme Court's language, the Second Circuit considered the essence of the plaintiffs' claim to be breach of fiduciary duty by target management. 722 F.2d at 4. The court, in declining to accept jurisdiction of the case, stated that entertainment of traditional state law claims would lead to "a federal common law of fiduciary obligations." Id.

It should be noted, however, that the Santa Fe Court further opined that federal courts "could be expected to depart from state fiduciary standards at least to the extent necessary to ensure uniformity within the federal system . . . where federal law expressly requires certain responsibilities of directors with respect to stockholders." 430 U.S. at 479.

24 722 F.2d at 5 (quoting Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757, 760 (2d Cir.), cert. denied, 104 S. Ct. 550 (1983)).


26 722 F.2d at 4; see also Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757, 760 (2d Cir.), cert. denied, 104 S. Ct. 550 (1983).
The Data Probe decision permits target management to employ any lock-up option or other defensive tactic designed to set a price ceiling on the target company's shares—and thereby affect market activity—as long as such actions meet the disclosure requirements of the 1934 Act. It is submitted that certain defensive tactics, especially stock or asset options conditioned on the success of a competing tender offer, constitute manipulative acts proscribed by section 14(e) of the Williams Act. In support of this conclusion, this Comment first will examine the legislative history of the Williams Act as a means of understanding the ends Congress sought in regulating the tender offer field. The Comment then will discuss the Sixth Circuit's decision in Mobil Corp. v. Marathon Oil Corp. and the evolving judicial philosophy that supports the proposition that informed investor decisions cannot properly be protected without substantive federal regulation. Finally, the Comment will conclude that defensive tactics that are intended to create a ceiling on the price of a target's stock, and thus, artificially to affect market activity, are manipulative acts, notwithstanding the absence of misrepresentation or nondisclosure.

LEGISLATIVE HISTORY OF THE WILLIAMS ACT

In determining the reach of section 14(e), courts have referred to the Act's legislative history for aid in understanding the section's largely undefined language. The evolution of the proposed

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27 For a comprehensive list of defensive tactics employed by target management after a tender offer has been made, see Harrington, If It Ain't Broke, Don't Fix It: The Legal Propriety of Defenses Against Hostile Takeover Bids, 34 Syracuse L. Rev. 977, 985-86 (1983). This Comment does not suggest that all defensive tactics are violative of the Williams Act. This Comment does advocate, however, that federal courts entertain claims that a party engaging in defensive tactics intended to affect market prices so as to foreclose competitive bidding during the course of a tender offer. Such a standard does not, obviously, permit the labeling of any one defensive tactic as a per se violation of § 14(e). On the contrary, this standard must be applied against any and all defensive maneuvers on a case-by-case basis.


29 In drafting the Williams Act, Congress provided a skeletal guideline to permit broad-based application to accommodate future developments in the tender offer field. Full Disclosure of Corporate Equity Ownership and in Corporate Takeovers Bids, Hearings on S. 510 Before the Subcomm. on Securities of the Banking and Currency Comm., 90th Cong., 1st Sess. 16 (1967) (statement of Manuel Cohen, Chairman, Securities Exchange Commis-
bill from its original anti-takeover nature to its policy of neutrality offers significant evidence of Congress’ intent to protect investors debating whether and to which bidder to tender their shares. Congress, however, favored neither target management nor tender offeror. In fact, Congress recognized that tender offers often were beneficial in combating “inefficient but entrenched management,” and concluded that such offers should not be discouraged. Congress declined to define tender offer. L. Soderquist, supra note 2, at 487 (1982). Two prominent commentators reason that the failure to define the term was not an oversight, but instead was attributable to a desire on the part of Congress and the SEC to preserve the flexibility necessary for ad hoc determinations. E. Aranow & H. Einhorn, Tender Offers for Corporate Control 69-70 (1973). It is suggested that the drafters contemplated that the general terms in the provision be endowed with similar elasticity. See Senate Hearings, supra, at 16 (remarks of Manuel Cohen) (need for effective tools to deal with progressive techniques of takeover offensive and defensive strategy).

30 Introduced by Senator Williams, and entitled “Protection Against Corporate Raiders,” the proposed bill was intended to regulate the conduct of “evil” tender offerors. See 111 Cong. Rec. 28257-58 (1965) (remarks of Sen. Williams); see also 113 Cong. Rec. 857 (1967) (statement of Sen. Kuchel).

31 See infra notes 32-34 and accompanying text. Originally designed to guard against “corporate raiders,” the bill was “substantially revised.” 113 Cong. Rec. 854 (1967) (remarks of Sen. Williams). In its final draft, the Act was “designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.” H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968). By implementing a neutral policy, Congress acknowledged that target management, as well as offerors, should be subject to regulation since both sides may “attempt to manipulate the public security holders to their own advantage.” See Full Disclosure of Corporate Equity, Hearings on H.R. 14475, S. 510 Before the Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 11 (1968) (statement of Manuel Cohen).


In Edgar v. MITE Corp., the Supreme Court struck down the Illinois Business Takeover Act, which imposed obligations and constraints on bidders in addition to the requirements of the Williams Act, as violative of the Supremacy and Commerce Clauses. 457 U.S. at 630. Although Edgar concerned the issues of preemption and undue burden on interstate commerce, the case is significant in its analysis of the congressional intent underlying the Williams Act. The Court concluded that Congress, in addition to requiring adequate disclosure, sought a position of “neutrality,” declining to favor either target management or competing bidders. Id. at 633; cf. Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58-60 (1975) (Congress did not intend to give target management an advantage in opposing takeover bids). The Court reasoned that Congress’ decision to afford advantages to neither side indicated a conclusion that the adequately informed investor could exercise his judgment and choice. 457 U.S. at 633-34; see 113 Cong. Rec. 24664-65 (1967) (statement of Sen. Williams); id. at 24665-66 (remarks of Sen. Javits).

33 See Edgar v. MITE Corp., 457 U.S. 624, 633 (1982); Senate Report, supra note 32, at 3. See generally Easterbrook & Fischel, The Proper Role of a Target’s Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161, 1194-1204 (1981) (economic ramifications of tender offers not solely within management’s domain); Gilson, A Structural Ap-
gress' objective was the dissemination of accurate information to the shareholder to enable him to "reach a decision without being pressured and without being subject to unwarranted techniques...designated to prevent that from happening." Thus, Congress sought two principal ends: maintenance of a shareholder's right of decision in the tender offer situation, and adequate disclosure to ensure that those decisions are made intelligently. Although courts have focused their attention primarily on disclosure, a procedural requirement, the Act contains several specific substantive provisions. Under section 14(d), shareholders enjoy rights of withdrawal, as well as the right to receive equal consideration for their shares and to have their shares taken up by the bidder on a pro rata basis when a partial offer is oversubscribed.

The legislative history of the Williams Act does not, standing alone, demand the inclusion of various defensive tactics under the rubric of "manipulative acts or practices." It is suggested, however, that the congressional desire to ensure that shareholders be given a fair opportunity to tender their shares as they choose lends support to a reading of section 14(e) manipulation that contem-
plates corporate activity, such as the granting of lock-up options, intended to remove that choice.

THE CONSTRUCTION OF MANIPULATION

Manipulation Under Marathon

_Mobil Corp. v. Marathon Oil Co._, in which the Sixth Circuit held that lock-up options affecting artificial changes in market conditions are manipulative acts, represents a minority viewpoint, and is regarded by many as an aberration among section 14(e) manipulation cases. It is submitted, however, that _Marathon_ accurately reflects the growing trend in the courts to prevent interference with the offeror-shareholder relationship in the tender offer context. In _Marathon_, the court distinguished the existing arrangement and its incidental effect on the market from other options, commonly termed lock-ups. The options granted—a stock option and a purchase option for Marathon's "crown jewel" oil fields—were deemed to be individually sufficient to create an artificial ceiling on the value of Marathon's shares in the tender offer context.

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47 _Id._ at 375.
48 See, e.g., _Buffalo Forge Co. v. Ogden Corp._, 717 F.2d 757, 760 (2d Cir.) (_Mobil_ was "an unwarranted extension of the Williams Act"), _cert. denied_, 104 S. Ct. 550 (1983); _Note, Tender Offer Defensive Tactics and the Business Judgment Rule_, 58 N.Y.U. L. Rev. 621, 622-23 (1983) (absent deception, material nondisclosure, or misrepresentation, lock-ups are a breach of fiduciary duty claims); _Note, supra_ note 5, at 281-82 (lock-ups should be evaluated exclusively by business judgment analysis); _Comment, Tender Offers, Lock-Ups and the Williams Act: A Critical Analysis of Mobil Corp. v. Marathon Oil Co._, 21 DUQ. L. Rev. 669, 706-07 (1983) (lock-ups should be reviewed under fiduciary standards).
49 See 669 F.2d at 374, 377. The _Marathon_ court noted that the type of options granted in the case had never before been put in issue in either the Supreme Court or any Court of Appeals. _Id._ at 374. The court thus viewed the options as among the new techniques designed to manipulate securities prices, for which the securities laws had been flexibly constructed. _Id._
50 _Id._ at 367. The stock option granted in _Marathon_ was an irrevocable option to purchase 10 million authorized but unissued shares of Marathon's common stock for $90 per share. _Id._ The 10 million shares were equivalent to approximately 17% of all outstanding shares. _Id._
51 _Id._ The option in _Marathon_ was for the purchase of Marathon's 48% interest in the oil and mineral rights in the Yates Field for $2.8 billion. _Id._ The power to exercise the option was conditioned on failure of the grantee's offer and a third party's gaining control of Marathon. _Id._ The Yates Field, admittedly Marathon's "crown jewel," was, by expert opinion, capable of producing from two to five billion barrels of oil. _Id._ at 368. Although the district court determined the option price of $2.8 billion to be fair, there was evidence that the field might be worth over $3.6 billion. _Id._ at 375.
The court reasoned that such intentional conduct, designed to "artificially affect securities markets," constituted manipulation in light of the flexibility of the securities law to accommodate "the full range of ingenious devices that might be used to manipulate securities prices." Similarly, the 200% stock option granted in Data Probe unquestionably deterred further competition since its exercise would have rendered meaningless a successful bid for the outstanding shares by another offeror.

Although the precedent set in Marathon has not been formally adopted in any other jurisdiction, the "market approach" philosophy adopted by the Third and Fifth Circuits and, most

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49 Each of the options placed economically prohibitive restraints on competing bids. Id. at 375. A competing bidder, in order to have been successful, would have had to have made an offer on par with that of the grantee's, at the risk of losing Yates Field by exercise of the option after having taken control. Id. Thus, a bidder would have had to include the value of Yates Field without any real hope of realizing the value paid. Id. The effects of the stock option made a successful third-party bid equally unfeasible. Id. It was estimated that because of the option, a competing bidder would have had to have spent an additional 1.1 to 1.2 billion dollars to have matched the grantee's offer. Id. In addition, for every dollar increase in the grantee's bid, the grantee's additional cost would have been $30 million, while the cost to a third party would have been an additional $47 million. Id.

50 Id. at 374. The court determined that the "only effect" of the Yates Field option was to terminate competitive bidding. Id. at 375.

51 Id. at 374 (quoting Santa Fe Indus. v. Green, 430 U.S. 462, 477 (1977)).

52 Even if a third-party offeror had received 100% of the outstanding shares on its bid, CRC's exercise of its option to purchase 200% of the company's shares would have completely frustrated the takeover. See Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1, 3 (2d Cir. 1983), cert. denied, 104 S. Ct. 1326 (1984).

53 The "market approach" philosophy contemplates that an investor, once provided with full disclosure, will be free "to make an unfettered and knowledgeable choice" whether to tender their shares to an offeror. See Kennecott Corp. v. Smith, 637 F.2d 181, 189 (3d Cir. 1980); Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1276-77 (5th Cir. 1978), rev'd on other grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979).


54 See Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980). The Kennecott court examined whether the New Jersey takeover law was preempted by the Williams Act, and whether preliminary injunctive relief was warranted. Id. at 182. The court stated: "Delay augments the possibility that the offer will not be completed successfully—not through adverse action of the shareholders, as Congress contemplates, but through barriers erected by the target management." Id. at 189. The court reversed a denial of injunction which the lower court had based on a finding that no irreparable harm would result. Id. at 190. Responding to the lower court's reasoning that harm incident to delay was the sole threat of
recently, by the Supreme Court,\textsuperscript{56} lends some support to the Sixth Circuit's construction of section 14(e) manipulation.\textsuperscript{57} In addition, a number of district courts have intimated acceptance of the Marathon doctrine in dicta, yet have denied relief for claims of 14(e) manipulation on facts that fall short of the unique circumstances present in Marathon.\textsuperscript{68} For example, in Whittaker Corporation v.
Edgar, an Illinois district court determined that the sale of a subsidiary by target management during a tender offer contest did not create an artificial ceiling on market price, since further bids could have been made for the corporation even without its subsidiary once the sale had been consummated. In contrast, the purchase option for corporate property in Marathon was contingent on a third-party takeover. Implicit in the Whittaker opinion was the rationale that had the defensive tactic locked up the competition and imposed a price ceiling in the tender offer market, it would have been prohibited as a manipulative practice.

The Marathon court, however, did not analyze whether some form of misrepresentation was necessary to support a claim of section 14(e) manipulation. The necessity of proving misrepresentation, on the other hand, was the heart of the Data Probe analysis and conclusion. An evaluation of whether an intent to mislead investors is "an essential element of a cause of action under proxy solicitation rather than tender offer); Whittaker Corp. v. Edgar, 535 F. Supp. 933, 949 (N.D. Ill. 1982) (sale of subsidiary not designed solely for purposes of blocking normal, healthy market activity); Conoco, Inc. v. Seagram Co., 517 F. Supp. 1299, 1303 (S.D.N.Y. 1981) (plaintiff's claim of irreparable damage caused by withdrawal of offer was without substance in light of more favorable subsequent offer). But see Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757, 760 (2d Cir. 1983) (Marathon is an "unwarranted extension of Williams Act"); Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623, 630 (D. Md. 1982) (Marathon "exceptionally strained interpretation of Santa Fe"); Marshall Field & Co. v. Icahn, 537 F. Supp. 413, 422 (S.D.N.Y. 1982) (Marathon's reasoning could unduly interfere with right of target management to oppose in good faith a tender offer believed to be harmful).


Id. at 949. The court determined that the sale of a substantial asset cannot be construed as designed solely for the purpose of terminating market activity, since such a sale could be characterized as part of healthy market activity due to the higher value that could be received apart from bids. Id. Significantly, the court emphasized that there was no lock-up involved since subsequent bids would be submitted for the corporation without the subsidiary, rather than for the whole entity. Id.

See Marathon, 669 F.2d at 387.

See Whittaker, 535 F. Supp. at 949. The language employed by the court indicated that if presented with an arrangement similar to that in Marathon, § 14(e) manipulation would be found. Id. In this connection, the court stated: "Thus, the sale of Sherwood has not created an artificial price ceiling in the tender offer market for Brunswick common shares which would be a manipulative act in violation of the Williams Act." Id.

See Marathon, 669 F.2d at 374. The Marathon court quoted the Santa Fe formulation of manipulation as conduct "intended to mislead investors by artificially affecting market activity." See id. (quoting Santa Fe Indus. v. Green, 430 U.S. 462, 476 (1977)). Nevertheless, the court characterized this formulation without reference to an intent to mislead, stating: "[T]he Supreme Court has recently indicated that manipulation is an affecting of the market for, or price of, securities by artificial means, i.e., means unrelated to the natural forces of supply and demand." 669 F.2d at 374 (emphasis in original).

See Data Probe, 722 F.2d at 4.
[section 14(e)] is, therefore, necessary to a proper defense of the Marathon position.

**Manipulation in the Tender Offer Context**

The *Data Probe* decision essentially was a product of the court's construction of manipulation. That construction, in turn, was derived entirely from the Supreme Court's formulation of the same term as used in section 10(b) of the 1934 Act. Manipulation was defined in *Santa Fe Industries v. Green* in the “technical sense of artificially affecting market activity in order to mislead investors.” The *Data Probe* court, apparently relying on the phrase “in order to mislead investors,” held that misrepresentation was essential to a 14(e) manipulation claim. Nevertheless, the *Santa Fe* Court recognized that “nondisclosure is usually essential to the success of a manipulative scheme.” It has been suggested that this language indicates that there may be instances in which certain devices or practices could be employed artificially to affect securities markets without an accompanying intent to mislead investors. The tender offer presents just such a unique opportunity.

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65 Id. at 4 (citing Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir.), cert. denied, 449 U.S. 951 (1980)).
66 See 722 F.2d at 4.
67 See id.; supra note 23; see also Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976) (manipulation in 10(b) context “connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities”). It should be noted that the Supreme Court limited its discussion of manipulation to dicta. See *Santa Fe Indus. v. Green*, 430 U.S. 462, 476-77 (1977) (10(b) does not regulate breach of fiduciary obligation claims); *Ernst & Ernst*, 425 U.S. at 199 (scienter required for commission of 10(b) violation).
69 Id. at 476.
70 See *Data Probe*, 722 F.2d at 4.
71 *Santa Fe*, 430 U.S. at 477 (emphasis added). Professor Loss states: “[N]ondisclosure of a manipulation is usually, if not invariably, essential to its success . . . .” 3 L. Loss, *Securities Regulation* 1565 (1961). It is submitted that not even this language forecloses a finding of manipulation within the tender offer context in the absence of an intent to mislead. See infra notes 71-74 and accompanying text.
72 See Weiss, supra note 4, at 1097 (Santa Fe language implies that manipulative practices may occur in absence of deception); Note, supra note 42, at 23.
73 The tender offer is the only method of acquisition in which there is a direct transaction between the shareholder and the acquiring corporation. Gilson, supra note 33, at 819; Note, *Golden Parachute Agreements: Cushioning Executive Bailouts in the Wake of a Tender Offer*, 57 St. John's L. Rev. 516, 516-17 & 516 n.2 (1983). In this regard, an inherent conflict of interest arises for target management, faced with the dilemma of serving the best
Bidders and management may observe the applicable disclosure provisions of the Act, and at the same time engage in activity that creates an artificial ceiling on the price of target stock. For example, target management may grant a lock-up option to one of several bidders that may be exercised in the event of a competing bidder's success. Potential bidders, resigning themselves to the futility of victory in the takeover battle, thus refrain from making an offer, while those who were originally in the bidding drop out. Such an option forecloses a competitive market and removes any possibility of shareholder decisionmaking. Thus, "manipulation" occurs before the open view of all parties to the tender offer, and with impunity. Such a result is not mandated by Santa Fe, and is in patent derogation of the purpose and spirit of the Williams Act. It is suggested, therefore, that, in the context of tender offers, manipulation be construed in connection with the result intended—artificially affecting market activity—not the means chosen.

Further, courts and commentators have recognized that the presence of manipulation in a transaction is grounded, not necessarily in an intent to mislead, but in the creation of an artificial impact on market activity such that the price per share does not "reflect the basic forces of supply and demand." Indeed, it has been
asserted that the creation of an artificial price for shares in itself provides the equivalent of deception—constructive fraud. According to this view, investors are deceived not by the price of the shares set by the natural forces of the open market, but by the conduct of the third party attempting to affect those prices. Moreover, it is suggested that applying a section 10(b) construction of manipulation to section 14(e) may be inappropriate. Use of the same or similar language in different sections of an act need not be given the same interpretation when the statutory context and legislative intent of the two sections differ.

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." Id.; see also Note, supra note 42, at 247-52 ("creation of an artificial market effect constitutes the true gravamen of the offense of manipulation").

Moreover, it is suggested that applying a section 10(b) construction of manipulation to section 14(e) may be inappropriate. Use of the same or similar language in different sections of an act need not be given the same interpretation when the statutory context and legislative intent of the two sections differ. Whereas section 10(b)

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79 Note, supra note 42, at 250-51. Relying on the common-law theory of manipulation prior to adoption of the 1934 Act, as set forth in Harris v. United States, 48 F.2d 771, 775 (9th Cir. 1931), and United States v. Brown, 5 F. Supp. 81, 84 (S.D.N.Y. 1933), aff'd, 79 F.2d 321 (2d Cir.), cert. denied, 296 U.S. 650 (1935), the author states: "These two cases plainly indicate that the fraud element of manipulation may be found in the absence of actual nondisclosure, because the substitution of an artificially affected market for a natural one 'misleads and deceives' investors." Note, supra note 42, at 251.

80 See Note, supra note 42, at 251-52.

81 See 722 F.2d at 4 ("'artificially affecting market activity in order to mislead investors' " (quoting Santa Fe Indus. v. Green, 430 U.S. 462, 476 (1977))). The Data Probe court relied on Billard v. Rockwell Int'l Corp., 683 F.2d 51, 56 (2d Cir. 1982), in holding that the Santa Fe construction of manipulation was equally applicable to causes of action under 14(e). Data Probe, 722 F.2d at 4. Unfortunately, neither the Data Probe nor the Billard court articulated any reason for engraving a 10(b) interpretation of manipulation onto 14(e), see 722 F.2d at 4; 683 F.2d at 56, and, thus, arguably failed to take into account differences in legislative purpose and statutory context between the two sections that may make reliance on the Santa Fe construction definitive for all § 14(e) claims of manipulation unjustified.

Because of language similarities between §§ 14(e) and 10(b), several courts have construed them as in pari materia. See, e.g., Panter v. Marshall Field & Co., 646 F.2d 271, 282 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Golub v. PPD Corp., 576 F.2d 759, 764 (8th Cir. 1978); Gulf & Western Indus. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 696 (2d Cir. 1973); Altman v. Knight, 431 F. Supp. 309, 312 (S.D.N.Y. 1977). However, Professor Weiss argues that manipulation should be construed to include practices that obstruct a free market, and advocates that 10(b) not be deemed controlling for purposes of 14(e). See Weiss, supra note 4, at 1097; infra notes 82-85 and accompanying text.

82 See Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 461 n.230 (D.C. Cir. 1976) (purposes underlying different sections of a statute in which the same word appears may require different construction), cert. denied, 434 U.S. 1086 (1978); Bailey v. United States, 360 F.2d 113, 116 (9th Cir. 1968) (identical words in a statute need not be construed in pari materia if such construction would frustrate congressional purpose); Data Probe Acquisition Corp. v. Datatab, Inc., 568 F. Supp. 1538, 1544 (S.D.N.Y.) (analysis of 10(b) manipulation does not apply "with equal force to the Williams Act"), rev'd, 722 F.2d 1 (2d Cir. 1983), cert. denied, 104 S. Ct. 1326 (1984); Weiss, supra note 4, at 1097-98 (Santa Fe construction of manipulation not controlling since decision rendered in 10(b) context). But see Fortin v. Marshall,
provides for the regulation of trading markets, section 14(e) is directed exclusively at tender offer regulation. Section 14(e) affords protection against proscribed conduct "in connection with any tender offer." Section 10(b), however, reaches the broad range of conduct that may occur "in connection with the purchase or sale" of securities. Thus, variations of purpose and scope between the two sections may make unwarranted a complete reliance upon the dicta in Santa Fe.

CONCLUSION

By rejecting the interpretation of section 14(e) proffered in the Marathon decision, the Second Circuit strictly limited investor protection under the provision to violations involving misrepresentation. Such a restrictive meaning circumscribes both the purpose of the "manipulative" clause and Congress' general intent in pro-

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608 F.2d 525, 528 (1st Cir. 1979) (presumption exists that same meaning attaches to identical words in different sections of an act).


84 See supra note 2. In Piper v. Chris-Craft Indus., 430 U.S. 1 (1977), the Supreme Court stated: "The legislative history thus shows that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer," id. at 35. The Court's conclusion was premised on statements made by the Act's drafters. Id. at 26-29. Senator Harrison Williams, the sponsor of the legislation, had enunciated the purpose of his bill as "legislation [that] will close a significant gap in investor protection. . . . [by] requiring full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case." 113 Cong. Rec. 854-55 (1967) (remarks of Sen. Williams); see supra notes 28-36 and accompanying text.

85 See supra notes 2, 28-36.


87 Notwithstanding the different focus of the two provisions, some attention is merited in regard to the spirit of § 10(b) and the Securities Exchange Act of 1934 as a whole in determining the extent to which Congress sought to federalize securities regulation and, in particular, market manipulation. Designed to "prevent inequitable and unfair practices on nationally traded exchanges and markets," S. Rep. No. 792, 73d Cong., 2d Sess. 1 (1934), the 1934 Act included provisions "aimed at those manipulative and deceptive practices which have been demonstrated to fulfill no useful purpose," H.R. Rep. No. 1383, 73d Cong., 2d Sess. 7 (1934). The House Report refers broadly to those "devices [that] are employed for the purpose of artificially raising or depressing security prices." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 7 (1934). Practices that were known to affect securities prices, such as "pegging" and options, were made subject to manipulation claims as the Securities Exchange Commission "deem[ed] necessary for the prevention of activities detrimental to the interests of investors." S. Rep. No. 792, 73d Cong., 2d Sess. 8-9 (1934). Thus, § 10(b) was designated a "catch-all clause," Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202-03 (1976), intended to prohibit intentional conduct by corporate insiders that interfered with investor rights, see H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13-14 (1934), but which, significantly, did not require an element of misrepresentation, id.
viding for a regulatory scheme capable of embracing future developments that substantially frustrate the shareholders' freedom of choice in their investment decisions. The acknowledgment by several of the circuit courts, and, most notably, the Supreme Court, that the Williams Act contemplates a market approach, suggests support for the manipulation interpretation of Marathon.

This Comment has suggested that the courts should not require a showing of misrepresentation of a section 14(e) manipulation claim. Tender offer transactions require this special treatment because the parties involved may fully disclose their conduct, manifest no deception whatever, and yet conclude agreements that artificially affect the market price of the target's shares and nullify the independent decisionmaking of shareholders for whose benefit the Williams Act was adopted.

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