Market in Crisis:
Mini-Tender Offers and the Failure of Federal Securities Laws to Protect Investors

Lydie Nadia Cabrera Pierre-Louis

What is the chief end of man?— To get rich.
In what way?— Dishonestly of we can, honestly if we must.
–Mark Twain

Abstract

The failure of the Williams Act to adequately protect investors in the context of mini-tender offers, has been an under analyzed aspect of federal securities laws and contract law. The Williams Act is a part of the broad and relatively complex U.S. federal securities laws. The Williams Act imposes strict disclosure requirements on an acquirer in a tender offer context, including accurate fair market valuation of the stock, when an acquirer offers to purchase a substantial position of stock directly from shareholders of a targeted public corporation. Typically, the offer is extended to shareholders without the consent of the targeted public corporation's board of directors.

The Williams Act is designed to provide disclosure to shareholders by requiring that the acquirer provide full and complete disclosure in all documentation provided to shareholders or made available to the public, including accurate fair market valuation of the stock. However, the Williams Act protectionary measures are triggered only when an acquirer purchases five percent or more of a targeted public corporation's outstanding stock. *Mini-tender offers* by definition are the acquisition of *less than five percent* of a targeted public corporation's outstanding stock. At the time that the Williams Act was adopted, Congress did not believe that less than five percent *de minimis* acquisition of a public corporation's outstanding stock, could affect control of a targeted public corporation's board of directors, and eventually alter corporate policy. As such, a shareholder who accepted a mini-tender offer to purchase his stock does not trigger the protection of the federal securities laws. Unfortunately, what Congress did not contemplate is a scenario in which a syndicate of private funds arguably *acting in concert* could systematically purchase slightly less than five percent of a targeted public corporation's stock over, and over, and over again. Thereby, evading the Williams Act protective disclosure requirements, and yet collectively, obtaining control of a targeted public corporation's board of directors, and eventually alter the corporation's corporate policy.

More disturbingly, the Williams Act does not allow a shareholder-offeree to rescind the tender of his stock pursuant to a mini-tender offer, once a shareholder-offeree realizes that an acquirer-offeror has not provided full and complete disclosure regarding the fair market valuation of his stock. It is interesting that fundamental contract law principles such as formation defenses including misrepresentation, ambiguity, and unequal sophistication of parties, have not been successful in providing an appropriate equitable remedy to shareholder-offerees such as rescission, reformation or modification of the contract. Federal securities laws have left shareholders in a mini-tender offer context, without an appropriate legal remedy. Perhaps it is time that fundamental common law fiduciary principles are re-analyzed to provide an equitable remedy for unsuspecting investors.