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Changes in Offeror Strategy in Response to New Laws and Regulations

Meredith M. Brown*

There have been a number of changes recently in state and federal laws governing tender offers as well as certain developments affecting the role of tender offers as opposed to alternative methods of effecting changes in corporate control. The author undertakes an analysis of the pragmatic effects of these changes on the conduct of tender offers from the perspective of the offeror's counsel and offers a practical checklist of items an offeror's counsel must consider in the preparation of a tender offer. Finally, he ventures some predictions concerning the future course of tender offer regulation and litigation.

KEEPING ABREAST of new laws and regulations¹ affecting tender offer strategy is like watching a close horse race. The observer, if quick of eye, can spot where things stand at a given moment; he may even be able to reconstruct how things reached their present state; he is aware that changes are occurring rapidly; but he can only guess how things will unfold.

Consider the following scenarios of two recent hostile tender offers, occurring less than two years apart.

Case 1: *Blitzkrieg*²

Announcement: On November 18, 1975, without advance warning, Colt Industries, Inc. announces a cash tender offer for shares of Garlock Inc. at \$32 per share. The offer is scheduled to expire on November 26—eight days later.

Post-Announcement Developments: Garlock sues Colt, alleging both securities and antitrust violations. Almost immediately,

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1. Except as noted, this article discusses state and federal tender offer legislation as of February 1, 1978.

2. The facts of the following tender offer can be found in the following newspaper articles: Wall St. J., Nov. 18, 1975, at 8, col. 2; *id.*, Nov. 20, 1975, at 18, col. 2; *id.*, Nov. 24, 1975, at 3, col. 4; *id.*, Nov. 26, 1975, at 6, col. 3; *id.*, Nov. 28, 1975, at 5, col. 1.

AMF announces a proposal to acquire Garlock for AMF stock. On November 24, Colt sweetens its offer to \$35 per share; Garlock withdraws its opposition; AMF withdraws its proposal.

Termination of Offer: The amended offer expires on December 5, 1975, by which time Colt has 92% of Garlock's stock.

Time Elapsed From Announcement to Termination: 18 days.

Case 2: *Trench Warfare*³

Announcement: On February 25, 1977, the president of United Technologies Corporation (UT) expresses to the president of the Babcock & Wilcox Company (B&W) UT's interest in B&W. On March 28, UT formally proposes to B&W's directors an offer at \$42 per share. B&W's directors on April 4 inform UT of their rejection of UT's offer. On April 5, 1977, UT publicly announces its intention to make a tender offer for B&W's shares at \$42, once the offer is cleared under applicable state statutes.

Post-Announcement Developments: B&W sues UT in federal court in Akron, Ohio, under the antitrust and securities laws and under the Atomic Energy Act. B&W seeks hearings under the takeover statutes of Ohio, New York, New Jersey, and Arkansas. Ohio holds hearings and ultimately recommends that the offer proceed, provided that it remains open for twenty days instead of the original ten days. The New Jersey Bureau of Securities, by order affirmed August 3, denies a hearing if withdrawal rights are broadened. The federal district court in Akron on July 15 denies B&W's request for an injunction against the offer. The Department of Justice brings suit in Hartford, Connecticut, to enjoin the offer. The suit is transferred to Akron, and the Akron court on August 4 denies the Department's request for a temporary restraining order. That same day UT finally makes the tender offer at \$48 per share. The stated expiration date of the offer is August 25. On August 12, J. Ray McDermott (JRM) offers to buy up to 4.3 million shares at \$55 per share. On August 18, UT responds to JRM's offer by increasing its price to \$55. On August 19, JRM raises its offer to \$60. On August 23, UT offers \$58. Again JRM

3. The facts of the United Technologies battle for control of Babcock & Wilcox can be found in these newspaper articles: *id.*, Mar. 30, 1977, at 3, col. 1; *id.*, April 5, 1977, at 3, col. 1; *id.*, April 6, 1977, at 2, col. 3; *id.*, April 12, 1977, at 3, col. 1; *id.*, July 18, 1977, at 15, col. 5; *id.*, July 19, 1977, at 10, col. 2; *id.*, Aug. 5, 1977, at 4, col. 2; *id.*, Aug. 15, 1977, at 2, col. 2; *id.*, Aug. 19, 1977, at 2, col. 2; *id.*, Aug. 22, 1977, at 4, col. 2; *id.*, Aug. 24, 1977, at 2, col. 2; *id.*, Aug. 25, 1977, at 4, col. 1; *id.*, Aug. 26, 1977, at 4, col. 1; *id.*, Sept. 19, 1977, at 12, col. 2.

increases its price, this time to \$62.50. On August 25, UT withdraws its offer.

Time Elapsed from Announcement to Termination: 152 days from March 28, the day on which UT presented its offer to B&W's board of directors; 182 days from February 25, the day on which UT first approached the president of B&W proposing a friendly acquisition.

From an offeror's perspective the two cases differ as much as the German invasion of France in 1870 differed from the German invasion of France in 1914. The object in each case was a swift conquest. While the offeror attained its objective in the first case, the second case led to stalemate, attrition, and ultimate defeat.

New laws account in large part for the differences between these two tender offer scenarios. That state takeover laws were essential to the defeat of United Technologies' bid for Babcock & Wilcox suggests that this new weapon in the hands of target companies may effect a power shift in the conduct of tender offers. The recent proliferation of state takeover statutes, however, may not mark the end of the swift tender offer since the recent, successful constitutional challenge of one such statute has been upheld by the Fifth Circuit.⁴

Other relatively new changes in tender offer regulation include a new antitrust act⁵ and proposed amendments to the tender offer rules under the Securities Exchange Act of 1934 under which tender offers will remain open for at least fifteen days.⁶ Moreover, recent amendments to the Exchange Act require disclosure of items not previously required including disclosure of certain acquisitions made prior to the tender offer.⁷ In addition, the SEC has proposed new rules which would extend federal regulation to going-private transactions.⁸ This article will summarize recent developments in each of these areas and offer some observations on the extent to which they impose new burdens that shift the balance of power in a tender offer.

4. See section 1(d) *infra*.

5. Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 18a (1976) [hereinafter cited as Hart-Scott-Rodino Act].

6. Proposed rule 14e-2, 41 Fed. Reg. 33,004 (1976).

7. Domestic and Foreign Investment Improved Disclosure Act of 1977, Pub. L. No. 95-213, §§ 201-204, 91 Stat. 1498 (1977) (to be codified in 15 U.S.C. §§ 78m(d), (g), (h), 78o) (amending Securities Exchange Act of 1934 § 13 (g), 15 U.S.C. 78m (1976)).

8. Proposed rule 13e-3, 42 Fed. Reg. 60,090 (1977).

1. *Developments in State Takeover Laws*⁹

Recent developments in state takeover laws include both the wide adoption of protective statutes by an increasing number of states and the first serious constitutional challenge to any of these statutes.

a. *The Proliferation of State Takeover Laws.* State takeover legislation dates back to 1968 when Virginia enacted the first state statute specifically addressed to tender offers.¹⁰ In 1969 Ohio became the second state to enact a takeover statute,¹¹ and thereafter a host of states followed suit. Adoption of takeover legislation in some states was doubtless motivated by a concern for maintaining existing tax bases. States without tender offer statutes would suffer from dwindling tax revenues if businesses reincorporated in jurisdictions offering protective takeover laws.¹² Whatever the impetus, takeover legislation blossomed. By September 1977 some thirty-three states had takeover statutes¹³ and more were being

9. The scope of this article permits only a cursory outline of state takeover legislation. For more comprehensive treatment, see: Aranow & Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U. L. REV. 767 (1971); Gibson & Freeman, *The Thirteenth Annual Survey of Virginia Law: 1967-1968—Business Associations*, 54 VA. L. REV. 1214 (1968); Langevoort, *State Tender Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213 (1977); Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687 (1975); Steinberger, *New York's Takeover Act*, 9 REV. SEC. REG. 879 (1976); Vaughn, *State Regulation of Tender Offers*, 3 SEC. L. REV. 475 (1971); Vaughn, *State Tender Offer Regulation*, 9 REV. SEC. REG. 969 (1976); Vaughn, *Tender Offers in Virginia*, 7 REV. SEC. REG. 879 (1974); Vorys, *Ohio Tender Offers Bill*, 43 OHIO B. 65 (1970); Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1 (1976); *Disclosure Problems in Tender Offers and Freeze-Outs—A Panel*, 32 BUS. LAW. 1365 (1977); Symposium, *Controlling Corporate Takeover Bids: State Regulation and the Ohio Approach*, 21 CASE W. RES. L. REV. 605 (1970); *The Tender Trap: State Takeover Bid Legislation*, 27 CORP. J. 291 (1976); Comment, *Tender Offers in Michigan: Has Something New Been Added?*, 1977 DET. L. REV. 347; Note, *State Takeover Statutes versus Congressional Intent: Preempting the Maze*, 5 HOFSTRA L. REV. 857 (1977); Note, *The Indiana Business Takeover Act*, 51 IND. L.J. 1051 (1976); Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CALIF. L. REV. 1133 (1974); Note, *Take-Over Bids in Virginia*, 26 WASH. & LEE L. REV. 323 (1969).

10. VA. CODE §§ 13.1-528 to .1-541 (1977).

11. OHIO REV. CODE ANN. § 1707.41 (Page Supp. 1977).

12. See, e.g., Proxy statement of Viacom International, Inc. dated March 14, 1975 (seeking shareholder approval of a merger that would change the state of incorporation from Delaware, which then had no takeover statute, to Ohio, which did).

13. Bartell, *State Take-Over Laws: A Survey*, in COURSE HANDBOOK FOR PRACTISING LAW INSTITUTE, NINTH ANNUAL INSTITUTE ON SECURITIES REGULATION (1977). The states include: Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin.

added to the list.

b. *Type of State Takeover Laws.* While state takeover statutes vary enormously in their specific provisions, they can be roughly grouped into three classes according to the type of regulation they impose: notice only, notice and hearing, and notice and hearing coupled with additional substantive regulation. The three classes are respectively exemplified by the Delaware, New York, and New Jersey statutes.

The Delaware statute, a pure notice statute, is also more modest than most of the state statutes in jurisdictional scope, applying only to offers for shares of corporations organized under its laws.¹⁴ The statute requires one contemplating a tender offer for a Delaware corporation to give not less than twenty days' notice to the target company¹⁵ and also requires the offer to remain open at least twenty days, during which time a depositor (a tendering shareholder) is free to withdraw his shares.¹⁶

The New York statute invokes broader jurisdiction and provides for a hearing as well as notice. It applies not only to offers for shares of New York corporations but also to offers for shares of any corporation "having its principal place of business and substantial assets" in New York.¹⁷ In addition to requiring twenty days' advance notice,¹⁸ the statute requires the offeror to file a detailed offering statement with the New York Attorney General.¹⁹ The Attorney General has the power to hold hearings to inquire into the adequacy of the disclosures and may delay the offer during the hearings.²⁰

14. DEL. CODE tit. 8, § 203(c)(2) (Supp. 1977). There is no such thing as a typical state takeover statute, but statutes often apply to offers for more than a certain percentage of a class of equity securities of the target company. Exceptions may be created for: (1) the acquisition of a limited number of shares, (2) a limited number of offerees, (3) companies with a limited number of shareholders or less than a specified amount of assets, (4) certain broker-dealer transactions, (5) certain exchange offers, (6) an offer which the board of directors of the target recommends for acceptance, (7) purchases by the issuer, (8) offers exempted by order or rules, and (9) offers for targets in certain highly regulated industries. Jurisdiction may be predicated on: (1) the incorporation of the target company within the state, alone or in combination with other factors, (2) the presence in the state of the principal office or place of business, alone or in combination with other factors, or (3) the presence of substantial assets in the state.

15. *Id.* § 203(a)(1).

16. *Id.* § 203(a)(2).

17. N.Y. BUS. CORP. LAW § 1601(a) (McKinney Supp. 1977).

18. *Id.* § 1602.

19. *Id.* § 1602-1603.

20. *Id.* § 1604.

The New Jersey statute goes beyond the New York statute, which limits the regulation of tender offers to the mere assurance of adequate notice and disclosure, by authorizing the state securities agency to block an offer if its terms are "unfair or inequitable" to the target's shareholders, or if the offeror's plans (even if fully disclosed) are not in the interest of the target's shareholders or employees.²¹ These additional powers permit shareholders to be second-guessed with respect to their investment decisions to tender or retain their shares.

c. *The Impact of State Takeover Laws.* Early commentators believed that state takeover statutes would substantially deter hostile offers. In 1969 a draftsman of the Ohio act predicted that "so far as Ohio and Ohio based corporations are concerned, the corporate takeover as a form of corporate warfare is a thing of the past."²²

The announcement was perhaps premature. Since that time at least eight hostile tender offers have been made for companies either incorporated in Ohio or able to claim "principal place of business and substantial assets" in Ohio.²³ The fact that seven of the offers occurred after September 1, 1975, may suggest that the Ohio act served to discourage prospective offerors from targeting Ohio corporations only when Ohio stood as one of the few states with a tough takeover statute. As more states adopted similar statutes and the possibility of avoiding the impact of state legislation lessened, offerors with patience and deep pockets were willing to take their chances on the vagaries and delays of Ohio administrative procedure.

The Ohio experience indicates that offerors have been willing to proceed with hostile offers in the face of strong state takeover laws. Nevertheless, only one of the offerors in the seven hostile offers involving the Ohio statute since September 1, 1975, succeeded at the price originally offered.²⁴ In that instance, the of-

21. N.J. STAT. ANN. § 49:5-4(a) (West Cum. Supp. 1978).

22. Vorys, *Ohio Tender Offers Bill*, 43 OHIO B. 65, 73 (1970).

23. See Sparton Corp. offer for Servotronics (announced Dec. 16, 1970); Imetal offer for Copperweld (announced Sept. 3, 1975); General Cable Corp. offer for Microdot, Inc. (announced Dec. 3, 1975); Bethlehem Copper Corp. offer for Valley Camp Coal Co. (announced Feb. 7, 1976); Thrall Car Mfg. Co. offer for Youngstown Steel Door Co. (announced June 1, 1976); United Technologies Corp. offer for Babcock & Wilcox Co. (announced April 4, 1977); Esmark, Inc. offer for Inmont Corp. (announced in June 1977).

24. Microdot, Youngstown Steel Door, and Babcock & Wilcox were able to find more acceptable suitors willing to pay a higher price than the original offerors. Inmont found a purchaser to buy out Esmark's position in Inmont.

feror challenged the statute's applicability, and consequently, a full hearing was never held under the statute.²⁵ The Ohio experience therefore illustrates that a strong takeover law has been a formidable weapon in the hands of incumbent management—operating not as a total bar to a particular tender offer, but as a stalling device giving the target time to take other defensive measures and to negotiate with alternative suitors. For this reason, challenges to the constitutionality of state tender offer statutes may substantially affect the balance of power in a takeover battle.

d. *The Great Western United Case*.²⁶ In March 1977 Great Western United Corporation announced its intention to make a cash tender offer for stock of Sunshine Mining Company. Sunshine was incorporated in the State of Washington, which has no takeover law. Sunshine's headquarters and more than 50% of its assets, however, were in Idaho; a Sunshine subsidiary, incorporated in Delaware, had its manufacturing facilities in Maryland; and Sunshine had enough business activities in New York to make application of the New York takeover law arguable.

Idaho's Director of Finance entered an order staying the proposed offer. Great Western encountered no success in its efforts to convince Maryland and New York officials to rule that the takeover statutes of those states did not apply. Exasperated, Great Western filed a declaratory judgment action in the federal district court in Dallas, seeking to enjoin officials of Idaho, Maryland, and New York from applying the laws of their states to the offer for Sunshine, on the grounds that such an application violated the commerce clause and that the statutes, as so applied, were preempted by the Williams Act amendments to the Securities Exchange Act.²⁷

25. In the Imetal acquisition of Copperweld, the Ohio Division of Securities filed a complaint against Imetal's acquisition of Copperweld and obtained a temporary restraining order against further activity by Imetal with regard to their tender offer. Imetal answered by challenging the agency's jurisdiction over their tender offer as well as the constitutionality of the Ohio statute. Before these issues were settled, the case was resolved out of court. On the same day this consent judgment was entered, the court decided to dissolve the restraining order.

26. 439 F. Supp. 420 (N.D. Tex. 1977) *aff'd*, No. 77-2809 (5th Cir. Aug. 10, 1978). See generally Case Note, 28 CASE W. RES. L. REV. 955 (1978).

27. 439 F. Supp. at 423-25. See generally 15 U.S.C. §§ 78 m(d)-(e), 79 n(d)-(f) (1976); IDAHO CODE §§ 30-1501 to 1513 (Cum. Supp. 1975); MD. CORP. & ASS'NS CODE ANN. §§ 11-901 to 908 (Cum. Supp. 1977); N.Y. BUS. CORP. LAW §§ 1600-1613 (McKinney Cum. Supp. 1977).

On September 2, 1977, Judge Robert M. Hill rendered a decision dismissing the suit as to Maryland for lack of a case or controversy and as to New York for mootness;²⁸ neither state was seeking to assert the jurisdiction of its act. The judge found the Idaho defendants properly before the court since their acts prevented Great Western from making an offer to the many Sunshine shareholders who lived in Texas. On the merits, Judge Hill found the Idaho statute preempted by the Williams Act because of the conflicting requirements and purposes of the two acts. He noted that the Idaho act requires more detailed disclosure than does the Williams Act: the Idaho act includes a delay mechanism before the tender offer becomes effective, while the Williams Act deliberately excludes administrative review prior to the actual offer, and the Idaho act, unlike the Federal act, exempts offers which are approved by the directors of the target company. On balance, the court found that the intent of the Idaho act was "to inhibit tender offers for the benefit of management," rather than allow tender offers beneficial to the shareholders to proceed.²⁹

The district court also found the application of the Idaho statute to shareholders outside of Idaho to be inconsistent with the commerce clause, both for lack of a legitimate state interest and for the burdens on interstate commerce imposed by the application.³⁰

The Fifth Circuit Court of Appeals declined to order a stay of the decision pending appeal, and Great Western finally commenced its tender offer on September 19, 1977. The target, seeing the handwriting on the wall, eventually withdrew its opposition to the offer, and Great Western United succeeded in buying over 22% of Sunshine's shares—all the shares it sought to buy—in the tender offer.

e. *The Impact of Great Western United on Offeror Strategy.* On August 10, 1978, the Fifth Circuit affirmed the decision of the district court for much the same reasons that underlie Judge Hill's decision.³¹ If the case is taken to the Supreme Court, I believe it should be affirmed because state statutes like that of Idaho deter offers, burden commerce, and, being blatantly pro-target management, are inconsistent with the balance between of-

28. 439 F. Supp. at 428-29.

29. *Id.* at 437.

30. *Id.* at 438-40.

31. *Great W. United Corp. v. McElDowney*, No. 77-2809 (5th Cir. Aug. 10, 1978).

feror and target company that Congress sought in the Williams Act.

As a result of the *Great Western* decision, state securities administrators may be expected to avoid lengthy jurisdictional disputes by being more circumspect in asserting jurisdiction over offers for shares of corporations not incorporated in their states. Moreover, there appears to be some evidence that state securities administrators will coordinate their reviews of tender offers, with one state taking the lead and other states deferring to the resolution of issues litigated in the lead state.³² Until the dust finally settles, an offeror must still make a careful analysis, based on the state of incorporation and available material concerning locations of plants and operations, to determine which statutes may be applicable. If the target company has plants, for example, in New York and New Jersey, an offeror will have an unpleasant choice. If the offeror ignores the New York and New Jersey statutes, it may provoke an order staying the offer. Such an order would remain in effect until the constitutionality of the application of the statute can be determined. The offeror may also risk criminal sanctions. On the other hand, compliance with the state statute entails an automatic delay while the state officials determine whether to hold a hearing and then (perhaps) hold a hearing. A middle course would be to comply with each arguably applicable state statute while contending its application would be unconstitutional and to sue the appropriate state officials in federal court if they appear likely to cause undue delay. Such an approach can result in reasonably prompt processing by state officials. There is no perfect solution to the dilemma; each tender offer will call for judgment based on contacts with the state, the nature of the state statute, and the attitude of the state officials.³³

32. This is precisely what occurred in the United Technologies offer for Babcock & Wilcox. The state securities officials in New Jersey and Arkansas followed the lead of the Ohio Division of Securities, which recommended that the offer proceed on the condition that it remain open for a longer period of time.

33. One interesting approach to a broad-reaching state statute is reflected in the Great Western tender offer for Sunshine. The Arkansas statute applies not only to offers for shares of corporations organized or having their principal office in Arkansas but also to offers for shares of corporations that have more than 35 equity security holders residing in Arkansas. ARK. STAT. ANN. § 1(5)(c) (1977). The Great Western offer states that Great Western "does not believe that the Arkansas statute constitutionally applies" to Great Western's offer, that Great Western is not making the offer to, nor will it accept tenders from, Arkansas stockholders, and that Great Western has not filed the registration statement called for by the Arkansas statute.

What will be the effect of *Great Western* on the balance of power in a tender offer? Martin Lipton, a veteran of many tender offer fights, has predicted that an affirmance of *Great Western* "will mean the return of the Saturday Night Special"³⁴—that is, a blitz offer, made without warning and scheduled to expire a bare seven or ten days later.³⁵

Several factors make me hesitant to embrace such a prediction. First, for good-sized offers, the Hart-Scott-Rodino Act³⁶ will almost certainly ensure that such offers remain open for at least ten days. Second, the SEC may seek to require an offer to be open at least fifteen business days, under the proposed tender offer rules.³⁷ Third, it is uncertain whether the court's approach in *Great Western* would invalidate all state takeover laws. Consider, for example, the limited jurisdiction of the Delaware statute,³⁸ applying only to offers for Delaware corporations. Substantively, this statute merely requires twenty days' notice before the offer becomes effective, a 20-day withdrawal period for tendering shareholders, and modest disclosures. It does not authorize administrative hearings and applies even-handedly whether or not the offer has been blessed by target company management. While the statute could be considered inconsistent with the Williams Act in mandating advance warning and a more lengthy withdrawal period, states traditionally have had broad powers in regulating both relations among shareholders and control changes in corporations organized under their laws.³⁹ Moreover, the relative innocuousness of the Delaware restrictions might persuade an offeror to comply with the statute rather than challenge its constitutionality.

2. *The Hart-Scott-Rodino Act*

Until recently no law required an offeror to give advance notice to the antitrust enforcement agencies before making a tender

34. N.Y.L.J. Sept. 8, 1977, at 1, col. 1.

35. The Williams Act does not directly prescribe any minimum period for a tender offer. A seven day minimum is implicit, however, in the requirement that depositing shareholders be free to withdraw their shares during the first seven days of an offer. Exchange Act §14(d)(5), 15 U.S.C. § 78n(d)(5) (1976). In addition, a 10-day requirement is implied if an offer is for less than all shares, since the maker of such an offer is required to take up pro rata all shares deposited during the first 10 days of the offer. *Id.* § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1976).

36. See section 2 *infra*.

37. See section 3 *infra*.

38. DEL. CODE tit. 8, § 203 (Supp. 1977).

39. See Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722, 740-51 (1970).

offer. In the past the only requirement has been that an offeror file a special report with the Federal Trade Commission within ten days *after* making a tender offer for 10% or more of the target's stock if the target company has sales or assets of \$10 million or more and combined sales or assets of the two companies total \$250 million or more.⁴⁰

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, effective February 27, 1977, requires that an offeror provide advance notification to both the Federal Trade Commission and the Antitrust Division of the Department of Justice, in the case of any acquisition of at least 15% of the voting securities of a company, if one of the companies has total assets or annual net sales of \$100 million or more and the other has total assets or annual net sales of \$10 million or more.⁴¹ In the case of a cash tender offer, the Act prescribes a waiting period of fifteen days, following notification to the government agencies, before shares can be acquired.⁴² Both antitrust enforcement agencies have the power to waive the waiting period altogether.⁴³ In addition, during the fifteen day waiting period, either agency may request that additional material be submitted and extend the waiting period ten days.⁴⁴

Although the Act went into effect on February 27, 1977, final rules were not promulgated until July 1978⁴⁵ and will apply only to tender offers communicated after September 15, 1978.⁴⁶

It is too early to predict with any confidence how the Hart-Scott-Rodino Act will affect tender offers. The Act will not delay the commencement of offers since it requires a waiting period prior to the acquisition of shares, as opposed to before the making of an offer. It will, however, produce delays in the completion of some offers.

Additionally, the antitrust strategy of offerors and targets will shift somewhat. An offeror will undoubtedly prepare as much material as possible in advance of the commencement of an offer—perhaps in the nature of a full-fledged memorandum of facts and law—in an effort to convince the government agencies that there is no antitrust problem, that adequate information has been

40. Resolution of Federal Trade Commission, *reprinted in* 1 TRADE REG. REP. (CCH) ¶ 4540 (Aug. 15, 1974).

41. 15 U.S.C. § 18a(a)(1976).

42. *Id.* § 18a(b)(1)(B).

43. *Id.* § 18a(b)(2).

44. *Id.* § 18a(e)(1) & (2).

45. 43 Fed. Reg. 28,045 (1978).

46. *Id.* at 33,450.

submitted, and that the waiting period should be waived (or at least not extended).

While the Act gives a target company an increased opportunity to use its best efforts to persuade the appropriate agency to intervene and delay or block an offer on antitrust grounds, it does not necessarily represent a dramatic shift of power in favor of the target company. Since the Act will increase the opportunity for agency participation in the antitrust aspects of takeovers, it may be expected that if the agencies have declined to take any action regarding the proposed acquisition, courts—some of which already view an antitrust complaint by a target company as “a form of gamesmanship from which the processes of a busy Court should not suffer”⁴⁷—may be less inclined to grant preliminary injunctions at the behest of a target company. The Act may create a risk for target companies bringing private antitrust actions that the court will be more inclined to find for the defendant offeror than would a court in a government suit, and that such a finding will make it less likely that a government suit, if brought, will block the takeover. A prime example of this scenario occurred in the United Technologies offer for Babcock & Wilcox. The Akron judge who denied a preliminary injunction on antitrust grounds in a suit brought by the target company was not swayed to enjoin the proposed takeover when the Department of Justice later came before it as the plaintiff. Despite the risks, there remain two strong reasons a target company may be expected to continue to bring antitrust actions against offerors. First, the suit will permit the target company to obtain quick discovery of facts concerning the industry and the anticompetitive effects of the acquisition, which can be fed to the government agencies in an effort to induce them to intervene. Second, the target company may be able to prevail—or at least to buy time—even if the government does not institute an action.⁴⁸

47. *GAF Corp. v. Circle Floor Co.*, 329 F. Supp. 823, 830 (S.D.N.Y. 1971). See also *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974).

48. At least three tender offers in the past two years have died as a result of preliminary injunctions issued on antitrust grounds. *Pargas, Inc. v. Empire Gas Corp.*, 423 F. Supp. 199 (D. Md.), *aff'd* 546 F.2d 25 (4th Cir. 1976); *Boyertown Burial Casket Co. v. Amedco, Inc.*, 407 F. Supp. 811 (E.D. Pa. 1976); *Chemetron Corp. v. Crane Co.*, No. 77-2800 (N.D. Ill. Sept. 8, 1977), summarized in *ANTITRUST & TRADE REG. REP. (BNA)* No. 833, at A-5 (Oct. 6, 1977).

3. *Amendments to the SEC's Tender Offer Rules*

On August 2, 1976, the SEC proposed extensive amendments to the rules and schedules relating to tender offers promulgated under the Exchange Act.⁴⁹ According to the SEC, the principal reasons for the amendments were to clarify the disclosure requirements relating to tender offers and to insure that investors had an adequate opportunity to consider communications from the offeror as well as from the target in deciding whether to sell, tender, or hold their shares.⁵⁰ If adopted as proposed, the amendments would establish a minimum number of days tender offers would have to be held open and would require a target company to turn over its stockholder list to an offeror. As of the date of this article, only one part of the proposed amendments—those amending the schedule an offeror must file with the SEC—has been adopted.⁵¹

a. *The New Tender Offer Schedule.* The new tender offer schedule, Schedule 14D-1, calls for more extensive disclosure by an offeror than has heretofore been required.

Some of the additional disclosure requirements, although new, either are not particularly burdensome or call for information offerors have frequently volunteered in tender offers, including:

i. information as to sales prices for target company shares for each quarterly period during the past two years;⁵²

ii. information as to any transaction within the past three full fiscal years between the offeror and the target company or its corporate affiliates, if the transaction involves an amount equal to or greater than 1% of the target's consolidated revenues;⁵³

iii. a description of contacts and negotiations with the target company concerning an acquisition, merger, or election of directors in the past three full fiscal years of the target company;⁵⁴ and

iv. any plan or proposal to change the target company's directors or management.⁵⁵

Much more troublesome is the new schedule's ambiguous requirement for financial information concerning the offeror, which appears in Item 9.⁵⁶ Item 9 would require disclosure in an of-

49. 41 Fed. Reg. 33,004 (1976).

50. *Id.*

51. 42 *id.* 38,341 (1977).

52. Schedule 14D-1, Item 1(c), 17 C.F.R. § 240.14d-100 (1978).

53. Schedule 14D-1, Item 3(a), *id.*

54. Schedule 14D-1, Item 3(b), *id.*

55. Schedule 14D-1, Item 5(c), *id.*

56. Schedule 14D-1, Item 9, *id.*

feror's SEC filing of "adequate financial information" concerning the offer if the offeror's financial condition "is material to a decision by a security holder of the subject [target] company whether to sell, tender or hold securities being sought in the tender offer." The SEC's release indicates that whether disclosure of financial information is material depends on all the facts and circumstances, including but not limited to, the amount of securities being sought, the offeror's plans with respect to the target, the offeror's ability to pay for tendered shares, and its ability to repay any loans in connection with the offer or otherwise.⁵⁷

The case law under section 14(e) of the Exchange Act, the general antifraud provision relating to tender offers, provides some guidelines as to when financial information may be material and thus may trigger the required disclosure in Schedule 14D-1. There is authority for the proposition that some financial information about an offeror may be necessary if the offer is for less than all the shares of the target company and the possibility of a post-tender offer merger exists. This disclosure requirement is apparently premised on the theory that in such an offer the target company's shareholders become shareholders of the offeror after the merger; consequently, they have a legitimate interest in the offeror's financial status.⁵⁸ On the other hand, some cases have held that financial information about the offeror is not material where the offer is one for all the stock of the corporation and there are no plans for a post-offer merger which would require an evaluation by the target shareholders of the offeror's shares.⁵⁹

In the absence of any real guidance from the Commission, I would expect to see offerors including (typically by incorporation by reference) financial information about themselves in their Schedules 14D-1 and briefly summarizing such financial information in the tender offers.⁶⁰

57. *Id.*

58. *Humana Inc. v. American Medicorp Inc.*, 445 F. Supp. 613, 616 (S.D.N.Y. 1977); *Corenco Corp. v. Schiavone & Sons, Inc.*, 362 F. Supp. 939, 948-50 (S.D.N.Y.), *aff'd in part and rev'd in part*, 488 F.2d 207, 214-15 (2d Cir. 1973).

59. *See, e.g., Copperweld Corp. v. Imetal*, 403 F. Supp. 579, 601 & n.60 (W.D. Pa. 1975); *Alaska Interstate Co. v. McMillian*, 402 F. Supp. 532, 546-48 (D. Del. 1975).

60. Rule 14d-1(c)(4) requires a tender offer to include "the information required by Item . . . 9 . . . of Schedule 14D-1 . . . or a fair and adequate summary thereof." 42 Fed. Reg. 38,347 (1977). Instruction 2 to rule 14d-1(c) states that summary financial information equivalent to that required under Guide 59 of the Guides of Preparation and Filing Registration Statements would normally be sufficient. *Id.*

What is "adequate financial information"? To be within the "safe harbor" afforded on this question by Instruction 1 to Item 9,⁶¹ a domestic offeror will need to include financial statements prepared in accordance with Form 10 under the Exchange Act.⁶² A foreign offeror would need to include financial statements complying with Form 20,⁶³ under which any material variations in accounting principles and practices from those generally accepted in the United States must be disclosed. To the extent practicable, the effect of each such variation must also be given.⁶⁴ Such a requirement seems to impose an unnecessary burden on a foreign offeror offering cash for all of a target company's shares and may conceivably deter some foreign offerors who have never prepared financial statements complying with Form 20 from making tender offers.

Also troubling are new Item 10, calling for disclosure of arrangements between the offeror (or its officers, directors, controlling persons, or subsidiaries) and the target company (or its officers, directors, controlling persons, or subsidiaries); applicable regulatory requirements that must be complied with in connection with the offer; the applicability of antitrust laws; the applicability of the margin rules; any material, pending legal proceedings relating to the offer; and "such additional material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading."⁶⁵ Disclosure of all this information is required only "if material to a decision by a security holder whether to sell, tender or hold securities being sought in the tender offer." Certainly one of the more difficult tasks of the offeror's counsel will be to determine just when this particular information is "material."⁶⁶ Absent further guidance from the SEC, offerors will have to rely on the case law under section 14(e) of the Exchange Act. Several of these cases suggest some of the circumstances under which disclosures as to the items mentioned in new Item 10 might be required. As an example, some courts have held that antitrust questions should be

61. 42 Fed. Reg. 38,349 (1977).

62. Form 10 is the general form for registration of securities pursuant to § 12(b) or § 12(g) of the Exchange Act. 17 C.F.R. § 249.210 (1977).

63. Form 20 is the general form for registration under the Exchange Act for a foreign private issuer. 17 C.F.R. § 249.220 (1977).

64. Instruction 1 to Form 20. *Id.*

65. 17 C.F.R. § 240.14d-100 (1978).

66. *Id.*

disclosed if the offer involved serious antitrust problems,⁶⁷ but not otherwise.⁶⁸ New Item 10 may mean that offerors will find it prudent to include disclosures as to the matters enumerated in the Item, even if such disclosures would not be required under the section 14(e) case law and even if the information is immaterial to target company shareholders.

It is safe to predict that tender offer litigation will continue to involve the question whether the offeror should have disclosed matters not specifically called for by Schedule 14D-1 (or its predecessor Schedule 13D).⁶⁹

Despite the Supreme Court's holding in *Piper v. Chris-Craft Industries, Inc.*⁷⁰ that a defeated offeror does not have standing to sue for damages under section 14(e), I believe that courts will continue to imply private rights of action for injunctive relief against tender offers involving inadequate disclosure. While the Supreme Court in *Piper* left open the question of standing to sue for injunctive relief,⁷¹ the long line of cases holding that the public interest is served if target companies can seek to protect their shareholders by bringing tender offer disclosure questions before the courts⁷² will probably survive *Piper*.⁷³

67. See, e.g., *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 697 (2d Cir. 1973).

68. See, e.g., *Missouri Portland Cement Co. v. Cargill, Inc.*, 375 F. Supp. 249, 268 (S.D.N.Y.), *aff'd in part and rev'd in part*, 498 F.2d 851, 871 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974).

69. One case holding that more may have to be disclosed under § 14(e) than is specifically called for by Schedule 13D is *Corenco Corp. v. Schiavone & Sons, Inc.*, 362 F. Supp. 939, 948-50 (S.D.N.Y.), *aff'd in part and rev'd in part*, 488 F.2d 207, 214-15 (2d Cir. 1973). Indeed, the SEC has broadened the scope of litigable disclosure topics. The Commission has indicated that Item 10(f) calls for disclosure of litigation not relating to the offer but "which may reflect on the integrity of the bidder." This reading is evidently intended to require disclosure of suits involving questionable payments by the offeror. In addition, the SEC has stated that Item 2(e) of the Schedule requires disclosure of criminal convictions of any officers of the offeror even prior to the 5-year cut-off if during the 5-year period the officer had been on probation or serving a sentence. 42 Fed. Reg. 38,348 (1977).

70. 430 U.S. 1, 42 & n.28 (1977).

71. *Id.* at 47 & n.33.

72. See, e.g., *Sonesta Int'l Hotels Corp. v. Wellington Assco.*, 483 F.2d 247, 250-51 (2d Cir. 1973); *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421, 424 (1st Cir. 1973); *Electronic Speciality Co. v. International Controls Corp.*, 409 F.2d 937, 946 (2d Cir. 1969); accord, Note, *Towards the Development of an Implied Right of Action Under Rule 14A-8 of the Securities Exchange Act of 1934*, 27 CASE W. RES. L. REV. 1010 (1977).

73. Cf., e.g., *Humana Inc. v. American Medicorp Inc.*, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,298 (S.D.N.Y. Jan. 27, 1978) (despite *Piper*, an offeror has standing under §14(e) to seek injunctive relief against the maker of a competing tender offer). As recently noted, target company suits for injunctive relief, "although tending to some extent to inhibit the making of tender offers, would appear to serve the interests of

b. *Access to the Target Company Shareholder List.* The SEC has proposed, but has not yet adopted, a rule which would make it a violation of section 14(e) for a target company to fail to furnish an offeror, within two days of receipt of the written tender offer, the most recent list of the target company's stockholders.⁷⁴ The proposed rule would require the bidder to undertake to use such lists exclusively in connection with the offer and to mail tender offer materials to each stockholder of record.

The SEC staff has indicated that it intends to continue to press for adoption of the rule or one that would require the target to turn over its stockholder list to the offeror or mail the offer to stockholders at the offeror's expense.⁷⁵ Such a rule would not, as a practical matter, make it easier for an offeror to succeed. Under present practice, if the offeror does not have a copy of the target company's shareholder list, the offeror publishes the offer in newspapers and distributes copies of the offer to broker-dealers. As a result, the only shareholders unlikely to hear of an offer before it is over are small, unsophisticated shareholders whose holdings are unknown to broker-dealers.

There is considerable doubt concerning the SEC's power to require the furnishing of a shareholder list. Traditionally, access to a shareholder list has been viewed as a matter of state corporate law.⁷⁶ As the statutory basis for the shareholder list rules, the SEC appears to invoke section 14(e) of the Exchange Act, which prohibits "fraudulent, deceptive, or manipulative" acts or practices in

shareholders in receiving more accurate or complete information about the offer." Mishkin & Nathan, *Tender Offers Continue to Surge as New Laws and Cases Alter Tactics*, N.Y.L.J., Dec. 19, 1977, at 30, col. 2.

74. Proposed rule 14e-1, introduced in Exchange Act Release No. 12,676 (Aug. 2, 1976), 41 Fed. Reg. 33,004 (1976). The Commission based its decision to propose 14e-1 on the information obtained both through its Tender Offer Hearings and its general experience. The Commission believes 14e-1 is preferable to requiring the target to mail the offeror's materials because 14e-1 would prevent potential abuses by the subject company such as delaying the mailing of the materials. Furthermore, 14e-1 would provide the bidder with the opportunity to communicate directly with security holders on an equal basis with the subject company, and it should facilitate communication of the tender offer to the greatest number of record holders and beneficial owners of the security. *Id.*

75. Remarks of Ruth D. Appleton, Director of the Office of Tender Offers, Acquisitions and Small Issuers, of the SEC, at the PLI's Ninth Annual Institute of Securities Regulation (Nov. 10, 1977). Mrs. Appleton has indicated that the shareholder list proposal would be released for comment, not adopted as a final rule.

76. See, e.g., *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910, 914 (N.D. Tex. 1976); *A&K R.R. Materials, Inc. v. Green Bay & W.R.R.* [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,266 (E.D. Wis. 1977); *Applied Digital Data Sys. Inc. v. Milgo Elec. Corp.*, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,861 (S.D.N.Y. 1977).

connection with a tender offer. But one must question whether it is "fraudulent, deceptive or manipulative" for a target company to withhold its shareholder list from an offeror. There is some case law utilizing section 14(e) as support for an order requiring a target company to turn over a list if the target itself has been using the list to communicate with stockholders or has made the list available to a competing bidder.⁷⁷ The proposed rule, however, would require the target company to furnish a list, even if the target has not been using the list to communicate with stockholders concerning the offer. Moreover, the cases requiring targets to turn over their shareholder lists antedated the Supreme Court's decision in *Santa Fe Industries, Inc. v. Green*.⁷⁸ *Santa Fe* held that section 10(b) of the Exchange Act and, by implication, other antifraud provisions such as section 14(e) are not concerned with unfairness unless accompanied by misstatements or less than full disclosure. As the cases which demanded turnover of a shareholder list did not involve falsehoods or nondisclosures, their continued viability is doubtful.

c. *Duration of the Offer.* Two of the SEC's proposed tender offer rules, which the SEC staff apparently still favors, would, as the provisions of many state takeover statutes do, prevent brief "blitz" offers. Proposed rule 14e-2⁷⁹ would make it a fraudulent or deceptive act or practice for a bidder to make a tender offer which does not remain open for at least fifteen business days from the date the offer commences. Proposed rule 14d-5⁸⁰ would give a shareholder the right to withdraw any shares deposited pursuant to a tender offer until the expiration of the tenth business day after the offeror's formal offer and related transmittal letters are published.

Section 14(d)(5) of the Act gives the SEC the authority to prescribe periods within which shareholders may withdraw deposited securities.⁸¹ It may be questioned, particularly in light of the deci-

77. *Applied Digital Data Sys. Inc. v. Milgo Elec. Corp.*, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,861 (S.D.N.Y. 1977); *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910 (N.D. Tex. 1976); *c.f. A&K R.R. Materials v. Green Bay & W.R.R., Inc.* [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,266 (E.D. Wis. 1977) (holding that § 14(e) did not require a target company to furnish its shareholder list to an offeror, when the target had commented on the offer in the newspaper, not in a mailing to shareholders).

78. 430 U.S. 462 (1977).

79. 41 Fed. Reg. 33,004 (1976).

80. *Id.*

81. Section 14(d)(5) of the Exchange Act provides:

sion in *Santa Fe*, whether the SEC has power under section 14(e) of the Exchange Act to require an offer to be open for a specified period. Is it really "fraudulent, deceptive, or manipulative" for an offer to be open for less than fifteen business days?⁸²

d. *Mechanics of Making a Tender Offer.* The Exchange Act does not specify the type or extent of publication of an offer which must be undertaken by an offeror without access to a target company shareholder list.⁸³ In light of this uncertainty, many bidders have printed the full text of the offer and the letter of transmittal—sometimes more than three printed pages—in the national edition of the *Wall Street Journal*, at a cost of close to \$100,000.

Proposed rule 14d-3⁸⁴ is an attempt to dispel the uncertainty surrounding this area and to reduce the offeror's publication costs. Under the proposed rule, which may be adopted within the next few months, an offer would be deemed to have been "published or sent or given to security holders," within the meaning of section 14(d)(1) of the Exchange Act, if the offeror follows any one of three courses of action: (1) mailing the offer to all stockholders of record; (2) publishing the full offer in a newspaper (which, "depending on the facts and circumstances involved," may have to be

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

15 U.S.C. § 78n(d)(5)(1976).

82. In the release announcing the proposed rule, the Commission argued that the rule would alleviate undue pressure on shareholders without unduly hindering the bidder making a tender offer. Exchange Act Release No. 12,676, 41 Fed. Reg. 33004 (Aug. 2, 1976). The Commission's theory appears to be that a tender offer should be kept open 15 business days in order to reduce pressure on investors and thereby decrease the possibility of their being victimized by "fraudulent, deceptive, or manipulative" practices.

83. The Act merely requires filing with the SEC at the time copies of the offer "are first published or sent or given to security holders. . . ." Exchange Act § 14(d)(1), 15 U.S.C. § 78n (d)(1)(1976); see Letter from Div. of Corp. Fin., SEC, to Advanced Sys., Inc., (Nov. 15, 1973), *quoted in* [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,653 (SEC would not take enforcement action against an offeror which both announced the offer to nationwide press services and ran the full offer as an advertisement in the regional edition of the *Wall Street Journal* for the region in which most of the shareholders were located). But see *Missouri Portland Cement Co. v. H.K. Porter Co.*, 406 F. Supp. 984 (E.D. Mo. 1975) (not sufficient publication to announce a 10-day offer by means of a tombstone summary and mail the full offer to holders shown on a year-old list).

84. 41 Fed. Reg. 33,004 (1976). The SEC's Division of Corporate Finance has recently warned that until proposed rule 14d-3 is adopted, summary publication of a tender offer is unauthorized. Advance Announcement, FED. SEC. L. REP. (CCH) No. 751, at 2 (May 18, 1978).

a newspaper of national circulation); or (3) publishing a brief summary of the offer, indicating when and where full copies of the tender offer materials can be obtained.

e. *Post-tender Offer Purchases.* Proposed rule 14d-6⁸⁵ would integrate with the tender offer certain purchases of securities made after the offer. Specifically, any purchases of securities which are, or which are convertible into, securities of the same class sought in the tender offer would be integrated with the tender offer if the purchases are made within forty business days after termination of the tender offer. The practical effect of the proposed rule would be to bar post-offer purchases because of the impossibility of complying with certain tender offer requirements, such as the right of withdrawal.

The Commission's staff is said to be internally divided as to the desirability of this proposed rule. Perhaps this is because the rule would prohibit, for no apparent reason, an offeror from buying shares in the open market at the tender offer price. The staff has been considering an alternative formulation under which the offeror, in the immediate post-offer period, would be required to pay to all sellers the highest price paid by the offeror to any seller but would not be required to comply with the withdrawal and pro rata acceptance provisions of the Williams Act.⁸⁶

4. *Amendments to Section 13 of the Exchange Act*

The Domestic and Foreign Investment Improved Disclosure Act of 1977 (the "Ownership Disclosure Act"), signed into law on December 20, 1977, amended in three principal respects the Exchange Act requirements addressing disclosure of beneficial ownership.⁸⁷ First, the Ownership Disclosure Act amended section 13(d) by authorizing the SEC to require additional disclosure of information, such as the citizenship of the offeror and its associates, by one who acquires more than 5% of a public company. Second, the Act adds a new section 13(g), which makes ownership of more than 5%, by any person, a reportable event. Such ownership must be reported even if the shares were acquired so slowly—less than 2% in any twelve-month period—that reporting would not be required under section 13(d).⁸⁸

85. 41 Fed. Reg. 33,004 (1976).

86. Exchange Act §§ 14(d)(5)–14(d)(6), 15 U.S.C. §§ 78n(d)(5)–78n(d)(6) (1976).

87. Pub. L. No. 95–213, §§ 201–204, 91 Stat. 1498 (1977) (to be codified in 15 U.S.C. §§ 78m(d), (g), (h), 78(o) (amending Exchange Act § 13(g), 15 U.S.C. § 78m(1976)).

88. Section 13(d) of the Exchange Act does not apply to any acquisition which, to-

The third amendment, section 13(h), directs the SEC to report to Congress concerning the desirability and the feasibility of lowering the reporting threshold from 5% to some lesser percentage. There appears to be a real possibility that the threshold will be lowered since an earlier version of the Act would have lowered the threshold to 1/2 of 1%.⁸⁹

The changes instituted by the Ownership Disclosure Act will prevent a patient prospective offeror from gradually accumulating more than 5% of the target's stock without prompt disclosure. The changes also suggest that a prospective offeror may soon be prevented from buying even less than 5% of the target's shares without public disclosure of the purchases.

5. *Going-Private Developments*

One major distinction between an acquisition by tender offer and an acquisition by merger or sale of assets is that the tender offer almost never acquires 100% of the stock of a publicly held target company in a tender offer transaction.

Inevitably, there are shareholders who cannot be found or who refuse to sell. Even in the context of a friendly tender offer, the offeror rarely acquires more than 95% of the target company's stock, even after numerous extensions of the expiration date of the offer. As a result, the offeror must either live with or act to eliminate a minority interest in the target company.

Living with a minority interest can be difficult. If there are a sufficient number of minority shareholders, the target company will continue to be a reporting company, subject to both the proxy rules and the periodic reporting requirements.⁹⁰ There are also likely to be many recurring conflicts of interest between the majority shareholder and the minority shareholders concerning such matters as dividends payable by the target company, loans from the target to the offeror parent, allocation of tax advantages and

gether with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2% of the class. 15 U.S.C. § 78m(d)(6)(B) (1976).

89. S. REP. NO. 953, 94th Cong., 2d Sess. 203 (1976). This version would have required disclosure by 2% holders, with the threshold dropping in steps to 1% and then to 1/2 of 1%.

90. Issuers registered under § 12(b) or § 12(g) of the Exchange Act, 15 U.S.C. § 781(b)(g) (1976), continue to be subject to the proxy rules under § 14(a), *id.* § 78n(a) (1976), and to the reporting requirements of § 13(a), *id.* § 78m(a) (1976), until such time as the security ceases to be traded on a national securities exchange and its total number of record shareholders drops below 300.

costs between the two companies, and other transactions between the two companies. Such conflicts of interest can be a prolific source of litigation.⁹¹

Eliminating the minority interest has become increasingly difficult in recent years and promises to become even more so. In a stock merger, minority shareholders may be eliminated and enjoy dissenter rights, but some state courts have held that minority shareholders cannot be eliminated in a cash merger transaction unless a valid business purpose for the transaction can be demonstrated.⁹² In the fall of 1977 the Supreme Court of Delaware first held that a cash merger for the sole purpose of eliminating the minority interest was an abuse of corporate law; the court did not explain what constituted a proper business purpose.⁹³ A subsequent decision by the same court held that while a business purpose to benefit the majority shareholder would not necessarily invalidate a going-private transaction, any such transaction would be carefully scrutinized to make sure it was entirely fair to minority shareholders.⁹⁴ In a third going-private case, the Delaware Supreme Court applied a rigorous test—apparently stricter than a federal materiality standard—in determining what information a majority shareholder must disclose in a going-private tender offer transaction.⁹⁵ Finally, on the federal level in November 1977, the SEC released for comment proposed rules which would not only codify disclosure requirements relating to going-private transactions but would also require that such transactions be fair to minority shareholders.⁹⁶

There is serious doubt whether the SEC has the power to impose a federal fairness requirement in going-private transactions. The statute relied upon by the SEC, section 13(e) of the Exchange Act, merely authorizes the SEC to promulgate rules to define and to prevent "fraudulent, deceptive, or misleading" acts and practices in connection with corporate repurchases of their own

91. See, e.g., *Jones v. H.F. Ahmanson Co.*, 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969) (conflict of interest with respect to opportunity for increasing marketability of shares); *Sinclair Oil Co. v. Levien*, 280 A.2d 717 (Del. Super. Ct. 1971) (conflict of interest as to dividends).

92. See *Bryan v. Block & Blevins Co.*, 490 F.2d 563 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974).

93. *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. Super. Ct. 1977).

94. *Tanzer v. International Gen. Indus. Inc.*, 379 A.2d 1121 (Del. Super. Ct. 1977).

95. *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. Super. Ct. 1977).

96. Proposed rule 13e-3, 42 Fed. Reg. 60,090 (1977).

stock.⁹⁷ The Supreme Court in *Santa Fe* held that a comparable antifraud statute, section 10(b) of the Exchange Act, did not proscribe a going-private transaction that was allegedly unfair to minority shareholders but did not involve misstatements or omissions of material facts.⁹⁸ In light of the *Santa Fe* decision, it is difficult to see how an antifraud statute can be read to impose a general fairness requirement in going-private transactions.

These recent state and federal developments in going-private transactions will have an impact on tender offers. The increased regulation of going-private transactions must be taken into account by offerors, who must consider how difficult it will be to eliminate the minority interest remaining even after a successful tender offer.

While the increased regulation of going-private transactions is unlikely to deter many offerors willing to undertake the problems of a contested offer, at least one effect is predictable if the federal rules are adopted as proposed. The proposed rules apply to certain transactions involving an offeror who is an "affiliate" of the issuer, and provide that an offeror who is not an affiliate of an issuer at the time the offeror starts a tender offer for the issuer's stock will not be deemed an affiliate "prior to the stated termination of such tender offer and any extensions thereof."⁹⁹ As a result, offerors are likely to hold their tender offers open for a long time in order to purchase as many shares as possible in the preliminary transaction that is not subject to the federal going-private rules. Moreover, if the initial offer leaves so few minority shareholders that the target's shares can be delisted and withdrawn from registration under section 12 of the Exchange Act, a subsequent going-private transaction would be subject to the proposed federal disclosure requirements but would avoid the proposed federal fairness standard.¹⁰⁰

6. *The Partial Renaissance of the Proxy Fight*

The conventional wisdom in recent years has been that the tender offer has replaced the proxy fight as the means of obtaining

97. 15 U.S.C. § 78m(e) (1976).

98. 430 U.S. 462, 471-77 (1977).

99. Proposed rule 13e-3(a)(1), 42 Fed. Reg. 60,090 (1977).

100. The proposed fairness rule, 13e-3(b), *id.*, applies only to issuers of securities registered pursuant to § 12 of the Exchange Act, while the proposed disclosure rule, 13e-3(e), *id.*, applies to issuers subject to § 15(d) of the Exchange Act, whether or not the securities of the issuer are registered on a national securities exchange. *Id.*

corporate control. This situation was attributed to the difficulty of ousting an incumbent management (unless it was demonstrably incompetent and the insurgents had a large stock position), the significant amount of money and time consumed by a proxy fight, and the impossibility of recouping proxy fight costs if the insurgents failed to take control.

The past year has seen a partial renaissance of the proxy fight in certain circumstances. This renaissance is more in response to market conditions than to regulatory developments. Proxy contests have begun to be worthy of consideration in situations where a target company's shares are trading at substantially less than asset value and the insurgents promise to the shareholders a way of realizing on the discount between market price and asset value.

The renaissance began with the closed-end investment companies. By definition, the shares of such funds (unlike the shares of open-end funds) are not redeemable at asset value.¹⁰¹ While shares of closed-end funds have sometimes traded at a premium over asset value, in recent years such shares have generally sold at substantial discounts, ranging from 15% to as much as 40% or more. In recent months, market professionals have bought sizeable holdings of certain closed-end companies and have proposed shareholder resolutions requesting the directors to take the steps necessary to provide that the companies become open-end funds. Such shareholder proposals have typically been approved in the face of strong management opposition.¹⁰² The ultimate result will be that the market professional shareholders (and the other shareholders) can make a profit by reason of the elimination of the discount.

The technique is even now being applied to a noninvestment company, Kennecott Copper Corporation. Kennecott has for some time been rich in cash, particularly after its sale of Peabody Coal Company for close to \$1 billion. In an attempt to make itself less vulnerable to possible takeover, Kennecott bought The Carborundum Company for \$567 million in 1977. Curtiss-Wright Corporation bought some 3,287,000 Kennecott shares in the open market at an average cost of \$23.42 and solicited support for an entirely new slate of directors committed to selling Carborundum

101. Investment Company Act § 5(a), 15 U.S.C. § 80a-5 (1970).

102. Such proposals were approved over management opposition by the shareholders of American Utility Shares in November 1977, *Wall St. J.*, Nov. 7, 1977, at 30, col. 1, and by the shareholders of National Aviation Corp. in March 1977, *id.*, April 10, 1978, at 5, col. 4.

and distributing a dividend of \$20 per share to all Kennecott shareholders or to making a tender offer to buy back 50% of Kennecott's stock at \$40 per share.¹⁰³ Curtiss-Wright, which says it would tender half its Kennecott holdings, stands to realize some \$65 million on the transaction, less proxy costs estimated at not less than \$350,000.¹⁰⁴ Since Curtiss-Wright owns just less than 10% of Kennecott's stock, there would be no need to disgorge profits under section 16(b) of the Securities Exchange Act, even if the transaction were to occur in the near future.

The traditional proxy fight has been difficult to win because shareholders are reluctant to vote against management. But the experience of the closed-end investment companies indicates that shareholders will vote against management when it is demonstrably in their immediate economic self-interest. The Kennecott experience indicates that short-run economic self-interest can, under the right circumstances, overcome shareholder reluctance to replace an incumbent board. Despite an adverse lower court decision¹⁰⁵ on the eve of the Kennecott annual meeting, Curtiss-Wright's nominees received over 11 million votes—not enough to win but not far short of the 12.6 million votes received by Kennecott's nominees.¹⁰⁶ It is conceivable that similar proxy contests may be made for other companies with asset values which are not reflected in the market price of their stock or which could be converted to cash and distributed to shareholders. Consider the mighty IBM, which on December 31, 1977, had cash and marketable securities of \$5.4 billion, or about \$37 per share, out of total net assets of \$12.7 billion.¹⁰⁷ IBM's investment income in 1977 came to only \$475 million—less than 10% of its \$5 billion earnings before taxes. IBM stock traded as low as \$249 in the fourth quarter of 1977. Perhaps one could buy a block of IBM at around \$250 and propose a slate of directors committed to a special dividend of \$35 per share—more than three times the 1977 dividend and a

103. Proxy statement of Curtiss-Wright Corporation (April 4, 1978).

104. *Id.*

105. The trial court held that Curtiss-Wright had violated the proxy rules and that its acquisition of control of Kennecott would violate the antitrust laws. *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, [Current] FED. SEC. L. REP. (CCH) ¶ 96,408 (S.D.N.Y. May 1, 1978).

106. Wall St. J., June 21, 1978, at 12, col. 1. Curtiss-Wright may renew its proxy solicitation efforts if the Second Circuit reverses the trial court's decision, which (according to Curtiss-Wright) caused substantial vote-switching in favor of Kennecott's management just before the meeting. *Id.*

107. IBM, 1977 Annual Report to Shareholders.

14% return on a \$250 purchase price. The special dividend might cause no more than a 10% impairment in IBM's earning power—but I am merely speculating.

While the partial renaissance of the proxy contest is largely in response to market conditions, it also reflects changes in the regulatory context. The conventional wisdom was that proxy contests took longer and cost more than tender offers. With the proliferation of state takeover statutes and court contests in tender offers, this may no longer be true. To be sure, Curtiss-Wright has estimated the cost of its solicitation to be at least \$350,000, but many contested tender offers cost the offeror well over \$1 million in legal fees, not to mention huge dealer-manager and soliciting dealer fees. Moreover, proxy contests are typically subject only to the federal proxy rules; the state takeover laws by their terms apply to tender offers, not to proxy solicitations. This means an insurgent in a proxy contest may be fighting merely a two-front war before the SEC and in the federal district court, not a war before a number of state securities commissions as well as in the federal court.¹⁰⁸ Proxy contests may now be quicker than some tender offers. If Curtiss-Wright had been successful in electing its nominees at the Kennecott annual meeting, the Curtiss-Wright fight for Kennecott might have lasted only two months—from mid-March to mid-May—a twinkling of an eye compared to the five-month United Technologies siege for Babcock & Wilcox.

7. *Checklist for an Offeror*

The preceding discussion has highlighted the effects of numerous regulatory changes in tender offer legislation and has briefly examined the proxy contest as an alternative method of acquiring corporate control. All of these developments may affect an offeror's initial determination as to whether to proceed with a tender offer. In addition, the regulatory changes may significantly affect the role of an offeror in a tender offer. It may be useful in summary to consider how such changes are integrated into the many concerns an offeror's counsel must address once the decision to launch a tender offer has been made. What follows is not a blueprint for an offeror, but a checklist of the kinds of questions

108. It should be noted, however, that Kennecott was able to obtain a temporary restraining order (later vacated) under the Utah Take-Over Disclosure Act which would have forbidden Curtiss-Wright from soliciting proxies—even though the Utah act makes no mention of proxy solicitations.

an offeror and its counsel should consider. The order within each category is roughly chronological.

a. *Formation of the Working Group.*

i. *The offeror.* Once the initial decision to proceed with the tender offer has been made, one of the first questions to consider is who, within the offeror, needs to know of the tender offer. The informed group should be kept as small as possible to lessen the chance of an information leak. Although information leaks have been known to benefit an offeror, they generally operate to an offeror's detriment. In a hostile takeover they may jeopardize the success of the offer by giving target management more time to organize its defense. In addition, an information leak may drive up the price of the target corporation's stock in anticipation of the offer, making the tender offer premium less attractive to the target company's shareholders.¹⁰⁹ As a matter of course, every informed party should be strongly warned against making any purchases of stock in the target company.¹¹⁰

ii. *Offeror's counsel.* The offeror's counsel should be familiar with the tender offer area. Because of the intricacies of tender offer strategy and the fact that the tender offer area abounds with traps for the unwary, the offeror may have to seek the aid of outside or special counsel to guide it through the maze of the offer.

iii. *Local counsel.* The increasing number of state takeover statutes makes it highly probable that a tender offer will involve the application of at least one, and possibly several, state statutes. Because of the wide variance in both jurisdictional scope and regulatory requirements of these statutes, it may be wise to line up local counsel who have had experience with the statute in question.

109. Although this discussion has focused on inadvertent information leaks, mention should be made of deliberate information leaks which present a different problem. Because of the potentially drastic impact a leak may have on the market for shares of the target corporation, an offeror who deliberately leaks may be liable for having engaged in a "fraudulent, deceptive or manipulative" act in violation of § 14(e), 15 U.S.C. §78(e)(1976), as well as liability as a tipper under rule 10b-5, 17 C.F.R. §240.10b-5(1977).

110. An employee of the offeror who buys target shares before an offer is announced, with knowledge that an offer is to be made, may be exposed to liability under rule 10b-5. See, e.g., SEC v. Healy, No. 74-4305 (S.D.N.Y. Nov. 18, 1974), Lit. Release No. 6589 (announcing 10b-5 consent judgment involving purchases by North American Phillips employees prior to announcement of that corporation's tender offer for Magnavox).

iv. Dealer-manager. An investment banking firm with tender offer experience can provide useful guidance both as to the price to be offered for the target's shares and as to the strategy in approaching the target. One important consideration in selecting an investment banker is the reputation of the investment banker among arbitrageurs, through whom much of the stock is typically tendered. An arbitrageur who builds up a position in the target company stock stands to incur substantial losses if the offeror decides not to go through with the tender offer. Consequently, arbitrageurs depend on the reputation of the investment banker, particularly if they are unfamiliar with the offer. A dealer-manager, however, is not essential for the success of an offer which is made for only a small amount of stock or for the stock of a small target primarily because small offers do not typically attract the interest of the arbitrageurs.

v. Information agent. A proxy soliciting firm, although not essential for the success of an offer, is helpful in fielding shareholder inquiries, distributing copies of the offer to brokers and dealers, and preparing and disseminating press releases.

vi. Depositary and forwarding agent banks. These banks play a fairly routine role in the tender offer and may be brought in at the last moment.

b. Analysis of Target Company. An offeror who hopes to be successful in its attempt to acquire control of the target corporation must make a careful analysis of information about the target. The analysis can be broken down into two broad categories: (1) information concerning the stock of the corporation and (2) other information concerning the organization of the target and the nature of its business.

i. Information concerning the stock of the target company.

(a) Authorized and outstanding shares. One of the first facts an offeror should ascertain is how many voting shares of the target are outstanding and how many are authorized but unissued. The issuance of authorized shares to friendly third parties is a standard defensive tactic used to thwart takeovers.¹¹¹

111. This tactic was used in the Chris-Craft Industries bid for Piper Aircraft Corporation. Piper entered into negotiations with Grumman Aircraft for Grumman to purchase 300,000 shares of Piper stock. The deal eventually fell through when the New York Stock Exchange indicated it had no intention of listing the shares which were to be issued to Grumman.

Target management, in issuing shares in this type of action, must take care not to vio-

(b) *Large holders.* An offeror should determine the identity of the principal shareholders of the target corporation. The target company's proxy statement may be the most helpful document for discovering this information.¹¹² Information as to the identity of large shareholders can be useful to the offeror for several reasons. Should a large shareholder be one without loyalties to the target corporation, it may be desirable for the offeror to purchase these shares before the offer is announced. Alternatively, if all the large shareholders are officers or directors of the target company, pre-offer purchases may not be a possibility and success in a hostile tender offer may be difficult to achieve.

(c) *Holdings by management and allies.* The amount of stock owned by, or under option to, the officers and directors may dictate whether an unfriendly tender offer will succeed. In addition, it will be necessary to determine how much stock is owned by, or under option to, allies of the target company or owned by an Employee Stock Ownership Trust (ESOT). An ESOT may have considerable defensive value for a target corporation. The target may seek to issue stock to the trust, either before or during a tender offer, for the purpose of diluting the voting strength of the stock sought by the offeror.¹¹³ Moreover, it is unclear whether the trustee of an ESOT may tender stock for the employees; sale of the issuer's stock is ordinarily not authorized by the ESOT trust agreement, although the trustee may have a fiduciary obligation to consider selling if the price is sufficiently attractive.

ii. *Other information about the target company.*

(a) *Reports to shareholders; SEC reporting documents; registration statements.* Much information that is needed about a target company can be obtained from documents otherwise filed with the SEC or sent to shareholders: registration statements, annual and quarterly reports to the SEC, and reports to shareholders. All of these documents are useful for information concerning the applicability of state takeover statutes, possible antitrust or

late its fiduciary duties to the corporation. See generally *Podesta v. Calumet Indus. Inc.*, [Current] FED. SEC. L. REP. (CCH) ¶ 96,433 (N.D. Ill. May 9, 1978).

112. Among other things, Item 5(d) of Schedule 14A requires the person soliciting proxies to list any person known to be the beneficial owner of 5% or more of any class of the issuer's voting securities. 17 C.F.R. § 240.14a-10 (1977).

113. But see *Klaus v. Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1975) (invalidating issuance by a target of shares to an ESOT during a struggle for control).

other regulatory agency problems, and the identification of the target's banks, auditors, and counsel.

(b) *Proxy statements.* Proxy statements can be a source of useful information about large stockholders and about the stockholdings of management and can provide some background information on the target company's directors.

(c) *Charter and by-laws.* The charter and by-laws of the target company can provide the offeror with information concerning the number of shares representing control of the target. In particular, these documents will state whether cumulative voting of the target corporation's shares is permitted and whether the board of directors is classified. The charter and by-laws will also reveal whether there are any special voting requirements for such corporate reorganizations as mergers, a fact bearing on the number of shares an offeror may need to acquire to assure the success of its post-offer plans. Of course, the charter will verify the target company's state of incorporation, which is important for determining the applicability of state corporate and takeover law provisions.

(d) *Loan agreements and other major contracts.* An offeror's examination of a target company is not complete without an analysis of the effect of a successful offer on loan agreements or other major contracts to which the target company is a party. It is not uncommon for loan agreements to contain default provisions that may be triggered by any change in the continuity of management, any merger, or any consolidation of financial accounts with those of another corporation. The offeror should have knowledge when such default will be exercised and, if so, when comparable financing will be available.

(e) *Employment contracts.* An offeror should investigate the target company's obligation to its employees under long-term employment contracts. If all the employees will be retained under the new management of the offeror, no problem arises. In the event that the offeror decides to replace some employees, however, the offeror must be aware of the cost involved in terminating the existing long-term contracts.

c. *Obstacles to be Investigated.*

i. *State takeover statutes.* The offeror's counsel must decide which state takeover statutes may be applicable. Each such statute

should be reviewed to determine, among other things, the permissibility of pre-offer purchases and whether there are any requirements as to pre-offer notice to the target or pre-offer publication of notice of intent to make an offer, the required contents of any required filing, and the length of time the offer must be kept open. It should also be noted whether there are provisions for hearings, and if so, their timing and what types of matters will be heard. In particular an offeror should be aware if the hearings are to review only adequacy of disclosure or also fairness of the offer to the shareholders. As to each potentially applicable statute, the offeror and its counsel must decide whether to comply with the statute, challenge it in the courts, or avoid making offers to shareholders in that state altogether, thereby incurring the risk of litigation by officials or shareholders of the excluded state.

ii. Assessment of other legal defenses available to the target company. Now that the new rules promulgated under the Hart-Scott-Rodino Antitrust Improvements Act have been adopted, it will be even more important for an offeror to anticipate and analyze the antitrust implications of the tender offer. Target companies can be expected to flood both the Justice Department and the Federal Trade Commission with material as to the adverse effect of the acquisition on competition in the hopes that one agency will find an anticompetitive impact sufficient to block the offer. Offerors must assess this potential defense to the offer and be prepared to defend a charge that the acquisition will have anticompetitive impacts.

iii. Special regulatory problems. Antitrust problems are not the only regulatory problems which may arise. A wide range of special regulatory problems may be encountered by the offeror. A few examples will suffice to illustrate the extent of the problem. If the target owns a television or radio station, control cannot be transferred without prior FCC approval.¹¹⁴ If the offeror is a foreign corporation, United States laws restrict its ability to own United States shipping,¹¹⁵ or to own radio or television licenses,¹¹⁶ and may restrict its ability to own stock in a target which owns federal mining leases.¹¹⁷ If the target has Canadian subsidiaries,

114. 47 U.S.C. § 310(d) (Supp. V 1975).

115. 46 *id.* § 883 (1970 & Supp. V 1975).

116. 47 *id.* §§ 310(a)-310(b) (1970 & Supp. V 1975).

117. 30 *id.* § 181 (1976) appears to disqualify a corporation from holding a federal mining lease if a significant amount of the corporation's stock is held or controlled by a

approval of Canada's Foreign Investment Review Agency is necessary before the offeror can take control of those subsidiaries.¹¹⁸

d. *Approach and Tactics.*

i. *Pre-offer meeting.* Whether a pre-offer meeting is scheduled will generally depend on whether the offeror intends a surprise offer. The proliferation of state statutes requiring pre-offer notice to the target makes surprise offers virtually impossible in most states. If a surprise offer is not feasible, a pre-offer meeting to explore the possibility of a friendly transaction will usually be desirable. A pre-offer meeting may be advantageous even if a surprise offer is possible. A friendly merger transaction is always cheaper than a contested tender offer because attorneys fees are lower and there are no soliciting dealer fees. Moreover, a friendly merger, unlike a hostile tender offer, will result in the offeror acquiring 100% ownership of the target company and will relieve the offeror of the problem of dealing with minority shareholders.¹¹⁹

ii. *Pre-offer approach.* There are numerous ways to approach a target company. The possibilities range from a "strong bear-hug" (in which the offeror publicly announces its proposal at the same time it requests a meeting with the target's management), to a "friendly bear-hug" (in which the offeror names a price and makes a specific proposal to the target's board but does not publish a press release), to a "casual pass" (in which the offeror expresses a strong interest and desire to meet with the target management but does not name a price).

iii. *Pre-offer purchases.* The offeror must decide whether it is desirable to purchase stock in the target company before seeking a meeting with the target's management. There are business advantages in such a course. Pre-offer purchases lend credibility to the offeror's negotiations with the target management and prevent potentially competing bidders from purchasing readily available shares on the open market. Purchasing shares of the target also makes it possible for the offeror to recoup its transaction costs

citizen of a country that would not permit a United States citizen to hold a government mineral lease.

118. Foreign Investment Review Act, 21-22 Eliz. II, c. 46, § 8(1), at 636 (1973). The Canadian agency will permit an offer for a target company with a Canadian subsidiary without prior agency approval if the offeror applies for agency approval at the time it begins its offer and recognizes that it may be forced to divest itself of the Canadian subsidiary if its application is denied. *Id.* §§ 8(3)(a)-13 at 637-43.

119. See section 5 *supra*.

or perhaps make a profit if the target finds a "white knight" who is willing to outbid the offeror. Pre-offer purchases, however, are not without business disadvantages. An offeror who purchases on the market during a pre-offer period may be committing capital to an unsuccessful venture should the tender offer fall through and the price of the stock drop. In addition, the offeror's purchases may push up the target company's stock, increasing the price which must be paid in a tender offer. A final disadvantage of pre-offer purchases is that the offeror runs some risk (albeit small) of tipping the target corporation.

In addition to business considerations, pre-offer purchases raise a number of legal questions which must be addressed before the offeror commits itself to such a course of action. The offeror must consider reporting requirements under section 13(d) of the Exchange Act¹²⁰ and under state law¹²¹ and decide when the acquisitions must be reported under each. An offeror who makes market purchases prior to the announcement of the offer will also have to consider what effect the purchases will have on the subsequent tender offer under state law.¹²² On the federal level the offeror must insure that the purchases are not viewed as a "creeping tender offer" which would subject the offeror to liability for failure to comply with the requirements of section 14(d) of the Exchange Act¹²³ and of applicable state takeover laws. Moreover, if

120. Section 13(d), 15 U.S.C. § 78m(d) (1976), requires disclosure whenever a "person"—a term defined in § 13(d)(3) to include a group acting for the purpose of acquiring, holding, or disposing of securities—becomes the beneficial owner of more than 5% of a of equity security registered under § 12 of the Exchange Act. 15 U.S.C. § 78m(a) (1976).

121. A recent survey of state takeover statutes indicates six states require filing when more than a specified percentage (5% in four states; 10% in two states) is acquired. Bartell, *State Take-Over Laws: A Survey*, in COURSE HANDBOOK FOR PRACTISING LAW INSTITUTE, NINTH ANNUAL INSTITUTE ON SECURITIES REGULATION (1977).

122. Six states prohibit the making of a tender offer if the offeror owns 5% or more of the target's stock, any of which was acquired within twelve months prior to the offer, unless the offeror has made a public announcement of its intention to seek control of the target. Bartell, *id.* at 375-77. The Ohio Division of Securities has recently held that the Ohio provision to this effect, OHIO REV. CODE ANN. §1707.041(2) (Page Supp. 1977), does not totally bar a tender offer if there has been an acquisition within the preceding 12 months without a public announcement of the offeror's intention. The Division announced that it will examine the intentions of the offeror at the time of the pre-offer acquisition. *In re Esmark*, 3 BLUE SKY L. REP. (CCH) ¶ 71,374 (July 5, 1977).

123. Courts thus far have tended not to view open market purchases as a tender offer under § 14(d), 15 U.S.C. § 78n(d) (1976), at least if there has been no announced intention to seek control. *E.g.*, *Copperweld Corp. v. Imetal*, 403 F.Supp. 579, 598 (W.D. Pa. 1975) (acquisition of 4.4% by an alleged affiliate many months before the offer). Compare *D-Z Inv. Co. v. Holloway*, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶94,771 (S.D.N.Y. 1974) (purchases of about 16% in open market did not constitute a tender offer)

the pre-offer purchases are held to be a tender offer, this will raise problems under rule 10b-13, which prohibits purchases during a tender offer.¹²⁴ The offeror will want to consider whether prior purchases will make it easier for the offeror to obtain the target's shareholder list¹²⁵ and also whether it will be able to keep any short-swing profits on transactions in the target's stock.¹²⁶

The offeror may wish to consider buying options rather than buying the target's shares outright. The legal questions raised by the acquisition of options are much the same as those raised by outright purchases of stock. The acquisition of an option to acquire more than 5% of a company's shares is as much a reportable event under section 13(d) of the Exchange Act as is the outright purchase of such a percentage, if the option is presently exercisable or is exercisable within sixty days.¹²⁷ However, an optionee may be denied access to the target's shareholder list if the statute

with *Loews Corp. v. Accident & Cas. Ins. Co.*, 74 C-1396 (N.D. Ill. July 11, 1974) (open market purchases were a tender offer when the purchaser had announced to all shareholders its intention to acquire a specified percentage of the target's shares in order to prevent third persons from acquiring control).

Important developments with respect to the propriety of pre-offer purchases may be expected in the pending case of *SEC v. Sun Co.*, No. 78-1055 (S.D.N.Y. March 9, 1978), in which the SEC has alleged that Sun Company, Inc. and others violated § 14(d) by buying, on uniform terms, 34% of the stock of Becton Dickinson & Company in a short period of time at a sizeable premium over market from members of the Dickinson family and a considerable number of institutional holders.

124. See *Sunshine Mining Co. v. Great W. United Corp.*, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,049 (D. Idaho 1977) (permissible under rule 10b-13 to buy blocks of shares three days prior to announcement of tender offer; the purchases were not part of the tender offer).

125. Under New York law, for example, a person may examine the shareholder list of a New York corporation either if the person has been a shareholder of record for at least six months or if the person has been authorized to make a demand for such examination by holders of at least 5% of any class of the corporation. N.Y. BUS. CORP. LAW §624(b) (McKinney Supp. 1977).

126. The Supreme Court has held that short-swing liability under §16(b) of the Exchange Act, 15 U.S.C. § 78p (1976), with respect to sales by the beneficial owner of more than 10% of a company's stock, applies only if the seller was a 10% plus holder at the time of the matching purchase. *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232 (1976). This indicates that an offeror who buys 16% of a target's stock in a single block and then sells at a profit to a competing bidder within six months would keep the profit. If the offeror has bought in several transactions, *Foremost* suggests the offeror would have to disgorge profits only on sales of stock purchased after the offeror had become a 10% holder.

127. Under rule 13d-3(d)(1), as amended effective May 30, 1978, a person is deemed to be the beneficial owner of shares that he has the right to acquire through the exercise of options within 60 days. 43 Fed. Reg. 18,501 (1978) (to be codified in 17 C.F.R. § 240.13d-3(d)(1)).

limits that right to shareholders who are shareholders as of a certain date.

One possible advantage of options, rather than outright purchases, is that the offeror can hope to obtain a degree of credibility vis-a-vis the target's management, comparable to that attained with outright purchases, at a fraction of the cash outlay required for such purchases.

e. *Financing the Acquisition.*

i. *Margin rules.* The offeror must take great care to avoid violating the margin rules¹²⁸ in connection with the financing of the offer. For example, the offeror should not permit an investment banker to act as an intermediary or "arranger" in seeking financing. Under Regulation T a broker may not arrange for a loan (except by a bank, in compliance with Regulation U) other than on terms upon which a broker itself could make a loan.¹²⁹ And a broker may make a loan only if fully collateralized by margin securities.¹³⁰

ii. *Identity of borrower.* The identity of the borrower may have important tax consequences. If the offeror, for example, is a foreign corporation and if the funds are to be borrowed in the United States, it may be desirable for the borrowing entity (and the offeror) to be a United States subsidiary of the foreign corporation. If these arrangements can be made, any interest paid on the acquisition loan can be deducted from the income of the target corporation, assuming that the domestic subsidiary and the target will be consolidated for United States tax purposes.

f. *Antitrust Reporting.* The offeror's counsel must consider reporting requirements both under the present FTC merger notification program¹³¹ and under the Hart-Scott-Rodino Act.¹³²

g. *Preparation of Documents.*

128. Section 7(a) of the Exchange Act regulates the extension of credit to be initially extended and subsequently maintained on any security. 15 U.S.C. § 78g(a) (1976).

129. 12 C.F.R. § 220.7(a) (1977).

130. 12 C.F.R. §§ 220.3(b), 3(c)(2) (1977). One tender offer was recently enjoined because of a violation of the margin rules with respect to the arranging of loans by a broker. *Pargas, Inc. v. Empire Gas Corp.*, 423 F. Supp. 199 (D. Md.), *aff'd*, 546 F.2d 25 (4th Cir. 1976).

131. See note 40 *supra* and accompanying text.

132. See section 2 *supra*.

i. Tender offer. The tender offer document sets out the actual terms and conditions of the offer to the target's shareholders. Even if the offeror intends to have a pre-offer meeting with the target management, it will be desirable to prepare the tender in advance of the scheduled meeting. This preparation will enable the offeror to proceed quickly with a hostile offer in the event that the target management rebuffs the offeror's overtures.

(a) Terms. A tender offer must specify all the terms of the offer, including the price to be offered for the shares of the target and the number of shares to be purchased by the offeror. In conjunction with the number of shares, the offeror should decide whether it should require tender of a minimum number of shares as conditional to the offer. Although setting a minimum reduces the risk for the offeror, it increases the risk for arbitrageurs, thus limiting or deterring altogether their participation in the offer. Other terms which must be drawn include the expiration date and the withdrawal date for the tendering shareholders. Those dates must be calculated to comply with any applicable state statutes and, of course, federal requirements. Although at present federal law does not require holding open the offer for a specific period of time, many state statutes do have such a requirement. In addition, section 14(d)(5) allows tendering shareholders to withdraw their shares sixty days after the offer commences and up to seven days after shareholders receive copies of the offer.

In some instances, an offeror may simply decide to exclude residents of certain jurisdictions to avoid state regulation. In this case the terms of the offer must specifically not extend to residents of the excluded jurisdiction. Finally, the offer should include information about soliciting dealer's fees and dealer-manager's fees.

(b) Disclosure questions. In addition to the terms of the tender offer, the offeror must determine how much and what types of information to disclose to target shareholders. There is an infinite variety of disclosure questions to be considered in preparing a hostile tender offer. Because of the near certainty that the target company will challenge the adequacy of disclosure under the Williams Act and under state takeover statutes, prudent offerors frequently choose to include disclosures of information which is only arguably relevant.¹³³

133. For helpful analyses of disclosure requirements under the Williams Act, see M.

Typical disclosure problems that should be addressed include how much information need be disclosed regarding the offeror and its affiliates (including financial information),¹³⁴ the offeror's plans or intentions with respect to the target,¹³⁵ financing (and financing repayment plans) for the offer,¹³⁶ antitrust questions with respect to the offer,¹³⁷ the applicability of regulatory requirements concerning the offer,¹³⁸ nonpublic information about the target known to the offeror,¹³⁹ the history of contacts between the offeror and the target,¹⁴⁰ the involvement of the offeror's management in questionable payments,¹⁴¹ and any matters called for by state takeover statutes but not required to be disclosed in Schedule 14D-1.

ii. State takeover statute filings. Many state statutes require not only a filing with the target and with a state agency but also a publication of a notice of intention to make a tender offer.¹⁴²

iii. Schedule 14D-1. If the tender offer is made for an equity security registered under section 12(g) of the Exchange Act, the offeror must prepare Schedule 14D-1 for filing with the SEC.¹⁴³

LIPTON, CORPORATE TAKE-OVERS: TENDER OFFERS AND FREEZEOUTS 52-82 (1976); Haft, *Disclosure in Cash Tender Offers*, 8 REV. SEC. REG. 975 (1975).

134. See *Ronson Corp. v. Liquifin Aktiengesellschaft*, 483 F.2d 846 (3d Cir. 1973); *Copperweld Corp. v. Imetal*, 403 F. Supp. 579 (W.D. Pa. 1975).

135. See, e.g., *Missouri Portland Cement Corp. v. H.K. Porter*, 535 F.2d 388 (8th Cir. 1976) (intentions as to liquidation of target).

136. See, e.g., *Alaska Interstate Co. v. McMillian*, 402 F. Supp. 532 (D. Del. 1975).

137. See, e.g., *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687 (2d Cir. 1973).

138. See, e.g., *Texasgulf, Inc. v. Canada Dev. Corp.*, 366 F. Supp. 374, 428 (S.D. Tex. 1973) (offer should disclose possible loss of FCC license if FCC disapproves the offeror's acquisition of control).

139. See, e.g., *Sunshine Mining Co. v. Great W. United Corp.*, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶96,049 (D. Idaho 1977) (no need to disclose certain allegedly nonpublic information).

140. Schedule 14D-1, Item 3(b), 17 C.F.R. § 240.14d-100 (1978).

141. *Babcock & Wilcox Co. v. United Technologies Corp.*, 435 F. Supp. 1249 (N.D. Ohio 1977) (permitting offeror to proceed with offer, disclosing what it then knew about merely questionable payments, although an investigation of the payments was still going on); *Gerber Prod. Co. v. Anderson, Clayton & Co.*, No. 77-188 (W.D. Mich. June 2, 1977) (holding that shareholders of the target company were entitled to full disclosure of certain questionable payments made by the offeror).

142. Bartell, *supra* note 121, at 369-71.

143. Exchange Act § 14(d)(1), 15 U.S.C. § 78n(d)(1) (1976).

iv. *Questionnaire*. Preparing these documents will generally necessitate preparing and distributing a questionnaire to the offeror's directors and officers requesting relevant information.

v. *Press releases*. The offeror must decide when to issue a press release—before or after the offer.

vi. *Advertisement of offer*. If proposed rule 14d-3 is adopted, a tombstone summary will be sufficient to publicize the tender offer. Until then, unless the offeror obtains the target's stockholder list and can mail the offer directly to stockholders, it may well be necessary to publish the full text of the offer.¹⁴⁴

vii. *Agreements with agents*. The offeror must prepare agreements with the dealer-manager, the soliciting agent, the depository bank, and the forwarding agent.

viii. *Demand for shareholder list*. If the offeror does not have a shareholder list, a demand under state law should be prepared.¹⁴⁵ At the same time the offeror should prepare follow-up papers to enforce the demand in court. An alternative means of obtaining the list, which may be pursued simultaneously with the state remedies, is to seek a shareholder list under section 14(e) of the Exchange Act on the theory that to withhold the list is a "fraudulent, deceptive or manipulative" act.¹⁴⁶ Of course, if the proposed tender offer rules are adopted as currently drafted, access to the list of shareholders will be required.¹⁴⁷

ix. *Loan agreement or commitment letter*. The offeror must obtain the loan agreement or commitment letter so that the offer can be financed if it goes through.

x. *Notice to antitrust authorities*.¹⁴⁸ The changing requirements for notice to antitrust authorities are discussed in section 2.

xi. *Report on Form 3*. If the offeror acquires more than 10% of the shares of a class of equity securities registered pursuant to section 12 of the Exchange Act, it must prepare a statement on

144. See note 83 *supra* and accompanying text.

145. See generally Atkins, *Stockholder Lists*, 9 REV. SEC. REG. 901 (1976).

146. See note 77 *supra* and accompanying text.

147. See notes 74-78 *supra* and accompanying text.

148. See section 2 *supra*.

Form 3 as to the extent of such beneficial ownership, under section 16(a) of the Exchange Act.¹⁴⁹

xii. Report on Form 8-K. Upon completion of the offer, if the offeror is subject to Exchange Act reporting requirements,¹⁵⁰ it must file a Form 8-K if it has acquired "a significant amount of assets."¹⁵¹

8. *Coda*

The laws and rules affecting tender offer strategy are changing rapidly and will continue to change. The swiftness of the changes and the multiplicity of applicable requirements make tender offer work uniquely challenging. Changes now in progress may make tender offers even more complex and expensive and may foretell a revival in proxy contest activity. I venture to predict, however, that unless the rules change even more dramatically, tender offers will continue to flourish, despite their cost and difficulty, as long as offerors value the shares of target companies at prices well above those reflected in the securities markets. This is because the tender offer continues to be an effective method by which control of corporations can be acquired despite the opposition of incumbent management.

149. See 15 U.S.C. § 78p(a) (1976).

150. Issuers having securities registered under § 12 of the Exchange Act must file periodic reports under § 13(a) of the Exchange Act, 15 U.S.C. § 78m(a) (1976).

151. 2 FED. SEC. L. REP. (CCH) ¶ 31,003.