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The Ohio Takeover Act: What Is It?

A. A. Sommer, Jr.

The Laws of most kingdoms and states have been like buildings of many pieces, and patched up from time to time according to occasions without frame or model. Bacon, An Offer to the King of a Digest to be Made of the Laws of England.

I. INTRODUCTION

ON JUNE 25, 1969, the Ohio House of Representatives,¹ following the lead of the Senate,² adopted the Ohio Tender Offer Act³ and on July 10, 1969, the Governor signed it into law. This represented a major achievement since the legislation had only been introduced the previous February 24, 1969; other legislation of apparently greater social import languished for longer periods. Of even greater note were the overwhelming votes in both Houses of the Legislature (30 to 2 in the Senate,⁴ 76 to 13 in the House⁵), and the convergence of the leadership of both parties, both the legislative and executive branches of government, and both industry and labor in its support.⁶

According to its preamble, the legislation was "for the purpose of protecting shareholders of Ohio and Ohio-based corporations by requiring public announcement and fair, full, and effective disclosure to such shareholders prior to the making of take-over bids."⁷

A bill to require disclosure is hardly startling. Disclosure is at the heart of the federal scheme of securities regulation, including

¹ OHIO H.R. JOUR. 14 (June 25, 1969).

² OHIO S. JOUR. 4 (Apr. 22, 1969).

³ OHIO REV. CODE ANN. § 1707.041 (Page Supp. 1969) [hereinafter cited as CODE].

⁴ OHIO S. JOUR., *supra* note 2, at 4.

⁵ OHIO H.R. JOUR., *supra* note 1, at 14.

⁶ One writer remarked: "The overwhelming Senate vote yesterday clearly nominated the bill as the best lobbied piece of major special interest legislation of the current session." The Plain Dealer (Cleveland), Apr. 23, 1969, at 7-C, col. 4.

⁷ Amend. Sub. S.B. No. 138, File No. 90 (Reg. Sess. 1969-70).

the Williams Act⁸ which regulates the making of tender offers, and two earlier attempts by state legislatures to govern in general the making of tender offers.⁹ In addition many state securities laws have as key provisions the requirement of disclosure to would-be investors.¹⁰

Among legislation requiring disclosure the Ohio Act is perhaps unique in that its provisions create a strong impression that its purpose is not to improve disclosure in connection with tender offers, but is rather to create a scheme of disclosure that will strongly inhibit, if not render impossible, the making of tender offers with respect to corporations which have the requisite relationship to Ohio, not only in Ohio but everywhere else as well. That such is the lurking purpose of the legislation has been bluntly acknowledged by Arthur I. Vorys, one of the defenders of the legislation:

The real impact of the law, in my opinion, will be felt not so much in its application as in its hovering omnipresence. *I suspect, 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.*¹¹

While purporting to protect shareholders, there is reason to believe that its provisions were really designed to place the management of companies within its gambit beyond the pale of unfriendly attack. The history of the legislation and the timing of its introduction confirm this suspicion. *Fortune* magazine, in detailing the successful defense of B. F. Goodrich Co. against the takeover attempt of Northwest Industries, Inc., has said: "Meanwhile, members of the Ohio Manufacturers Association, including a Goodrich representative, were meeting in Cleveland to draft state legislation that would block or delay tender offers. A similar bill was later co-sponsored by State Senator William Taft."¹²

This was not the first time that the Ohio legislature had addressed itself to the tender offer problem. Because they involve the offer and sale of securities within the meaning of the term "sale"

⁸ 15 U.S.C. §§ 78m(d)-(e), n(d)-(f) (Supp. IV, 1969).

⁹ Ch. 97, §§ 2-20, [1969] Nev. Acts 120-25; VA. CODE ANN. §§ 13.1-528 to -540 (Supp. 1968).

¹⁰ "Nearly half the statutes either require the *use* of a prospectus or empower the administrator to require it. In practice the *filing* of a prospectus is required much more often than its *use*. But at least 16 jurisdictions do require either by statute or by rule — statutory authority for the rule is not always too clear — that a prospectus actually be used, at least in some cases." L. LOSS & E. COWETT, *BLUE SKY LAW* 305 (1958).

¹¹ Vorys, *Ohio Tender Offers Bill*, 43 OHIO BAR 65, 73 (1970) (emphasis added).

¹² O'Hanlon, *Goodrich's Four-Ply Defense*, FORTUNE, July 1969, at 110, 113.

in the Ohio Securities Law,¹³ exchange offers — offers of securities in exchange for other securities — have always been subject to that law's provisions, as they are subject to the comparable statutes of other states.¹⁴ Moreover, even prior to the adoption of the Act, Ohio had not remained quiescent in the face of cash tender offers. When control of Glidden Corp., an Ohio corporation, was sought by Greatamerica Corp., Glidden mounted not only a successful counterattack in the federal court,¹⁵ but in the Ohio Division of Securities as well.¹⁶ Glidden contended that only a dealer licensed in Ohio could make a tender offer because *Ohio Revised Code* section 1701.14 forbade anyone to "engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless such person is licensed as a dealer by the Division."¹⁷ The Division responded to this argument by determining that the making of a tender offer was conduct that could only be legally carried on by a licensed dealer and ordered discontinuance of the offer until it was done by one.¹⁸ Thereafter Greatamerica recommenced the offer with the services of dealers licensed in Ohio. This administrative interpretation was described in *Layritz v. Condec Corp.*¹⁹ as a "'one shot' Ohio administrative ex post facto interpretation."²⁰ That court rebuffed an effort to extend further the application of the Ohio Securities Law in a case involving a combined cash and security tender offer.

Perhaps because of the hostility evidenced by the court in *Condec*, and certainly in response to the increased tempo of takeover activity during 1968, Ohio corporations began to address themselves to the possibility of state legislation to inhibit takeover attempts. Their concern was matched by that of their counterparts in Pennsylvania, who, similarly assailed by possible losses of industry, prepared and began to seek adoption of a bill governing tender offers.²¹

¹³ CODE § 1707.01(c)(1) (Page 1964).

¹⁴ L. LOSS & E. CROWTHER, *supra* note 10, at 34.

¹⁵ *Moore v. Greatamerica Corp.*, 274 F. Supp. 490 (N.D. Ohio 1967).

¹⁶ Order of the Division of Securities, May 15, 1967.

¹⁷ CODE § 1707.14 (Page 1964).

¹⁸ Order of the Division of Securities, May 15, 1967.

¹⁹ Civil No. 6439 (S.D. Ohio 1967).

²⁰ *Id.*

²¹ Pennsylvania H.B. 841 (1969 Sess.).

Initially a bill was drafted at the behest of an Ohio-based company, the most significant feature of which was the provision that prior to the commencement of a tender offer there might be required a hearing by the Division which would have to determine that the offer was "fair" and "that the disclosures relative [to it] are fair and adequate."²² This bill, simple and direct, omitted virtually all the other unusual provisions incorporated in the measure which finally became law and was relatively confined in its application.

In February 1969, a tender offer bill was introduced in the Ohio Senate as an amendment to the Ohio Securities Law. After considerable amendment which did nothing to blunt its anti-tender-offer effect this bill was adopted.

Somewhat surprisingly the draftsmen of the Ohio Act chose to number it *Code* section 1707.041, thereby apparently intending to relate it somehow to the section concerned with certain types of reorganizations.²³ This designation endured through the legislative process despite the statement of the Legislative Service Commission that it was inappropriate:

[I]t is doubtful that the bill's subject matter is truly supplemental to section 1707.04 which deals with securities issued in connection with a corporation reorganization. A take-over bid involves a proposed change in control, and may or may not contemplate a reorganization or a new issue of securities.

. . . .

²² A copy of this proposal, never introduced, is in the files of the author.

²³ The Ohio Securities Law [CODE §§ 1707.01-46 (Page 1964)], originally enacted in 1929, has been changed little through the years. Like the securities laws of many jurisdictions, the Ohio Law requires both the licensing of dealers [*id.* § 1707.14] and the registration of securities [*id.* §§ 1707.06-10] and the Division of Securities was given the power to bar from Ohio offers if it found they were on "grossly unfair terms" or there was a failure to meet other criteria [*id.* § 1707.09]. Thus, exchange offers had to be registered (barring the availability of a security or transaction exemption) before the offering could be commenced in the state. Additionally, the offer could only be made in "transactions through or with a licensed dealer." *Id.* § 1707.14(B).

In 1943 the Ohio Law was amended to include section 1707.04. This section appears to have been designed to permit, in certain circumstances, reliance upon the exemption from registration under section 3(a)(10) of the Securities Act of 1933 [15 U.S.C. § 77c(a)(10) (1964) (hereinafter cited as Securities Act)]. Section 3(a)(10) exempts from the registration and prospectus provisions of section 5 of the Securities Act [*id.* § 77e] certain transactions "where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions . . . by any governmental authority expressly authorized by law to grant such approval." *Id.* § 77c(a)(10). The wording of section 1707.04 appears to bring it clearly within the scope of section 3(a)(10) of the federal act. Noteworthy in section 1707.04 is the variety of transactions which may be subject to it: mergers and consolidations; exchanges of securities of the issuer for securities of another issuer (presumably including voluntary exchange offers); and acquisitions of assets in exchange for securities and the distribution of the securities received by the seller.

[T]he bill's provisions [should] be codified as a series of sections at the end of Chapter 1707.²⁴

The principal advantage apparently seen by the legislation's draftsmen of incorporating the Act into the structure of the Securities Law was that transactions violative of it would become subject to the same liability and penalty provisions which apply to other violations involving securities, as well as the procedural means afforded for securing relief, *e.g.*, section 1707.23 (enforcement powers of the Division),²⁵ section 1707.24 (contempt proceedings),²⁶ section 1707.26 (injunctions against violations),²⁷ and section 1707.99 (criminal penalties).²⁸ To assure that the old shoes fit the new feet, the Act specifically provides: "An offeror is subject to liabilities and penalties applicable to a seller and an offeree is entitled to remedies applicable to a purchaser, as set forth in sections 1707.41 to 1707.44, inclusive, of the Revised Code."²⁹ However, as discussed later, there is some question as to how effective this grafting effort may prove to be.

In brief, the legislation embodies the following provisions:

(1) A "takeover bid" may not be made until certain information has been filed with the Division and the target company, and the Division has determined, either on its own motion or at the behest of the target company, either that a hearing with respect to disclosures proposed to be made to offerees is unnecessary or, after hearing, that such disclosures satisfy the statutory criteria.

(2) The "offeror" must comply with certain substantive requirements similar to those contained in the Williams Bill,³⁰ including pro rata acceptance of securities tendered during the first 10 days, and payment of increased consideration to all who tender.

(3) Any person owning 5 percent or more of any class of equity securities of the target company may not make a takeover bid if during the 1-year period preceding its proposed commencement he purchased any such securities of the target company without disclosing before such purchase either publicly or to the seller that he intended to gain control of the target company.

²⁴ Letter from Legislative Service Commission to Rep. Barry Levey, May 20, 1969.

²⁵ CODE § 1707.23 (Page 1964).

²⁶ *Id.* § 1707.24.

²⁷ *Id.* § 1707.26.

²⁸ *Id.* § 1707.99.

²⁹ *Id.* § 1707.041(C) (Page Supp. 1969).

³⁰ Securities Exchange Act of 1934, § 14(d)(6), 15 U.S.C. § 78n(d)(6) (Supp. IV, 1969) [hereinafter cited as Exchange Act].

In addition to these provisions, the contents of the disclosures to the target company and the Division are set forth with considerable particularity. The Act contains definitions of various terms used therein, exemptions from the application of its provisions, and certain miscellaneous provisions.

Although the Act is inserted into the Ohio Securities Law as a part thereof, in all respects, except for provisions with respect to the necessity that takeover bids be made through licensed dealers and except for the effort, perhaps abortive, at least in part, to make applicable to takeover bids the liability and penal provisions of the Securities Law, the bill is a comprehensive, self-sufficient and independent enactment which might have been adopted as a separate piece of legislation without relationship to the Ohio Securities Law.

II. DEFINITIONS

A. *Takeover Bid*

For the most part the definitions contained in the Act are predictable. The first definition, and probably the most important, is that of takeover bid.³¹ This term, while perhaps possessed of some emotional content, nonetheless has derived respectability from the fact that it is the customary term in England describing an offer made to the shareholders of a company sought to be acquired³² and is, furthermore, incorporated in the Virginia and Nevada statutes relating to tender offers.³³ Takeover bid is defined as:

- [a] the acquisition of or an offer to acquire
- [b] pursuant to a tender offer or request or invitation for tenders
- [c] any equity security
- [d] of a corporation
 - [i] organized under the laws of Ohio or
 - [ii] having its principal place of business and substantial assets within the State of Ohio and
- [e] if after the acquisition the offeror [a defined term] would be, directly or indirectly, the record or beneficial owner of more than 10 percent of any class of the issued and outstanding securities of the subject corporation.³⁴

As in the Williams Act amendments to the Securities Exchange Act

³¹ CODE § 1707.041(A)(1) (Page Supp. 1969).

³² See *The City Code on Take-Overs and Mergers, discussed in Sullivan, Registration of Take-Over Bids: A British Approach*, 24 BUS. LAW. 1275 (1969).

³³ Ch. 97, §§ 2-20, [1969] Nev. Acts 120-25; VA. CODE ANN. §§ 13.1-528 to -540 (Supp. 1968).

³⁴ CODE § 1707.041(A)(1) (Page Supp. 1969).

of 1934, the words "tender offer" and "tender" are not defined. The SEC has ruled that "special bids" on an exchange are subject to the provisions of Exchange Act sections 13(d) and 14(d); for all practical purposes this has eliminated "special bids" as a means of acquiring substantial amounts of stock.³⁵

The failure to define these terms, of course, leaves many questions unanswered. It would appear, although without express indication, that a simple accumulation of, or an order to a broker to accumulate, more than 10 percent of a class of outstanding equity securities of an issuer would not constitute a tender offer, although it is to be expected that target companies would make this contention. In an unusual complaint filed by Lee National Corp. against the directors of Kansas City Southern Industries, Inc.,³⁶ the plaintiff charged that defendant target company, having alleged that the stock purchase program of Lee (apparently not a tender offer in the conventional sense) was a tender offer, should file a Schedule 14D as required by Exchange Act section 14(d), which requires that such a schedule be filed by anyone soliciting in opposition to a tender offer.³⁷ The complaint, of course, does not constitute a determination that purchasing in the market is a tender offer.

It is clear that the term tender offer in the Ohio Act applies equally to cash tender offers and exchange offers; as indicated earlier, the previously existing provisions of the Ohio Securities Law had and continue to have applicability to exchange offers and, by interpretation of the Division, to a limited extent to cash tender offers. The Williams Act, which, of course, would apply concurrently with the Ohio Act in appropriate circumstances (as would the blue sky laws of other states in which an offer is made), expressly excludes from section 13(d) and 14(d) offers made pursuant to a registration statement under the Securities Act of 1933,³⁸ but section 14(e) prohibiting fraud-like conduct in connection with tender offers is not so limited.³⁹ This limitation of the Williams Act has been criticized since it in effect frees the company whose

³⁵ Schmults & Kelly, *Disclosure in Connection With Cash Take-Over Bids: The New Regulations*, 24 BUS. LAW. 19, 28 (1969).

³⁶ Lee Nat'l Corp. v. Hawkins, Civil No. 3823 (D.C. Del., filed Dec. 10, 1969), reported in 30 SEC. REG. & L. REP. A-8 (1969).

³⁷ Exchange Act § 14(d), 15 U.S.C. § 78n(d) (Supp. IV, 1969).

³⁸ *Id.* § 13d(5)(A), 15 U.S.C. § 78m(d)(5)(A); *id.* § 14(d)(8)(A), 15 U.S.C. § 78n(d)(8)(A).

³⁹ *Id.* § 14(e), 15 U.S.C. § 78n(e).

securities are sought in a registered exchange offer from the necessity of filing communications with the SEC, a freedom not available in the case of a cash tender offer or in a proxy contest.

The statute is specific in limiting its applicability to efforts to acquire the equity securities of *corporations*; it would not appear to apply to participations in real estate investment trusts, which are not corporations in the conventional sense, or in limited partnerships. The latter exclusion has increased significance, of course, as an increasing number of economic endeavors, *e.g.*, oil and gas participations, are cast in limited partnership form.

The provision defining takeover bid in terms of "direct or indirect" ownership of more than 10 percent of any class of the issued and outstanding equity securities of the target company suggests that, in determining whether the requisite degree of ownership has been or will have been achieved, securities of the class issuable upon conversion of other securities or exercise of warrants must be taken into account. Also, of course, any ownership, even if only beneficial and bereft of voting power, must be taken into account.⁴⁰ Further, in view of the statute's definition of "equity security,"⁴¹ it would appear that acquisition, or proposed acquisition, by tender offer, of more than 10 percent of a class of outstanding convertible debentures, convertible preferred stock, or warrants might be construed as a takeover bid. All of these are included in the definition of equity security and would presumably be regarded as separate classes.

The question has been raised whether the definition of takeover bid might be construed to include solicitations by a corporation of tenders from its own securityholders. While it would appear that such an interpretation would be inconsistent with the overall structure of the Act (if the issuer is the offeror, who is the target company?), and its purpose, nonetheless, it cannot be said with certainty that a court might not, given facts suggesting some abuse by management, so construe it. The SEC was, under the Williams Act, given explicitly broad power to regulate the repurchase of its own shares by a corporation;⁴² rules issued so far have been limited to requiring disclosure by corporations purchasing shares during

⁴⁰ CODE § 1707.041(A)(1) (Page Supp. 1969).

⁴¹ See text accompanying notes 78-79 *infra*.

⁴² Exchange Act § 13(e)(1), 15 U.S.C. § 78m(e)(1) (Supp. IV, 1969).

the period when another offeror is conducting a tender offer for its shares.⁴³

The wording of this definition of takeover bid would indicate that if a corporation had acquired, say, more than 10 percent of a class of convertible debentures in the market and then made a tender offer for, say, 2 percent of the common, the tender offer would be a takeover bid, since literally, after the acquisition of the common stock, it would be the owner of "more than 10 percent of *any* class of the issued and outstanding equity securities of such corporation."⁴⁴ In other words, the operative event is not a bid which will result in owning 10 percent of the class which is the subject of the bid; the operative combination which constitutes a takeover bid is the expectation of ownership "of more than 10 percent of any class" of equity securities after a bid for *a* class of equity security.

The most significant, and undoubtedly the most controversial, aspect of the definition is the inclusion in takeover bid of tender offers directed towards the securities of a corporation "organized under the laws of this State *or having its principal place of business and substantial assets within this state . . .*"⁴⁵ This provision, of course, poses intriguing questions. For instance: (1) Given the traditional doctrine that the state of incorporation may, to the exclusion of other states, regulate the internal affairs of a corporation,⁴⁶ is the regulation of a tender offer a matter of "internal affairs," thereby conferring upon the state of incorporation exclusive jurisdiction over such matters, regardless of the contacts of other jurisdictions, *i.e.*, location of properties and offices, location of quantities of shareholders? (2) Are there other contacts superior to "principal place of business and substantial assets" which would justify regulation by a jurisdiction other than Ohio, perhaps to the exclusion of regulation by Ohio?⁴⁷

Obviously this definition is studded with constitutional issues; these are discussed elsewhere. It may be noteworthy that section 1707.04 of the Ohio Securities Law pertaining to the issuance of securities in reorganizations limits its applicability to a corporation "organized under the laws of this state, or having its princi-

⁴³ SEC Rule 13e-1, 17 C.F.R. § 240.13e-1 (1969), *reprinted in* 2 CCH FED. SEC. L. REP. § 26,852, at 20,107-3.

⁴⁴ CODE § 1707.041 (A) (1) (Page Supp. 1969) (emphasis added).

⁴⁵ *Id.* (emphasis added).

⁴⁶ See H. HENN, CORPORATIONS 99 (1961).

⁴⁷ LOSS & COWETT, *supra* note 10, at 180.

pal place of business within this state";⁴⁸ there is in this provision no mention of "substantial assets" within the state. It may be that the drafters of the Act felt that to shore up the constitutionality of the provision it would be better to extend the necessary contacts in Ohio of a target company not incorporated in Ohio, thereby increasing the chances of a successful defense to charges that Ohio's interests in a tender offer directed to shareholders of a non-Ohio corporation were not sufficient to satisfy constitutional requirements. The jurisdictional requirement of a very early draft⁴⁹ (never submitted to the legislature) referred to tender offers for any class of equity security of "any corporation incorporated under the laws of this state, doing business in this state and having more than --- registered holders of such class of equity security in this state" (draft did not include a number). Obviously the requirement that there be a significant number of shareholders in the state would shore up considerably Ohio's claim of jurisdiction.

The Act specifically excludes from the definition of takeover bid certain activities:

(1) "Bids made by a dealer for his own account in the ordinary course of his business of buying and selling such security" are excluded.⁵⁰ This provision, seemingly innocuous, poses certain significant problems. Obviously a dealer bidding for a security in the ordinary course of business of buying and selling such security is not going to do it in the manner in which a tender offer is typically conducted — by advertising, direct solicitations of holders, and so on. Hence, if this exemption is to be construed as having significance, then it would appear that without it the definition of takeover bid might apply to the conduct of a dealer accumulating a position by purchases in the market. As a consequence of the specific delineation of this conduct by a dealer as *not* included in takeover bid, is similar conduct by any other person, such as placing a bid with a dealer for execution in the market with the purpose of accumulating more than 10 percent of a class of equity securities, to be construed as encompassed within the term takeover bid? Obviously

⁴⁸ CODE § 1707.04 (Page 1964).

⁴⁹ See note 22 *supra*.

⁵⁰ CODE § 1707.041(A)(1)(a) (Page Supp. 1969). A minor anomaly of this section derives from the fact that "dealer" under section 1707.01(E)(1) is defined as meaning "every person . . . who engages or professes to engage, in this state, for either all or part of his time, directly or indirectly, in the business of the *sale* of securities" [*id.* § 1707.01(E)(1) (Page 1964) (emphasis added)]; no mention is made in this definition of one who buys securities.

such an interpretation would extend the scope of this enactment considerably beyond what is generally conceived to be its limits.

(2) An exchange offer — securities for securities — that is sufficiently limited in number and nature of offerees that the transactions would be exempt from registration under the Securities Act of 1933 because of the operation of section 4(2) of that Act, the so-called “private offering exemption,” is also excluded from the scope of takeover bid.⁵¹ To be entitled to the exclusion from the definition, the offers and purchases must be made for the *sole* account of the offeror, they must be made in good faith, they must not be for the purpose of avoiding the Ohio takeover legislation and *only* securities may be offered — there may not be a consideration of cash and securities. Inasmuch as this exemption is structured in terms of an exemption from the definition of the term takeover bid, it appears that any such proposed exchange offer would, in all probability, regardless of this provision, be required to be registered under the Ohio Securities Law since that law has no equivalent of the private offering exemption. The Division would then be authorized under section 1707.09 (registration by qualification, which would probably be the necessary course) “as a prerequisite to qualification” to “make an examination of the issuer of securities sought to be qualified;” to determine whether such offer would be on “grossly unfair terms”; whether “the business of the issuer is . . . fraudulently conducted”; whether “the plan of issuance and sale . . . would defraud or deceive, or tend to defraud or deceive”; and whether the proposed offer otherwise conforms with the Act’s requirements.⁵² Thus, even if compliance with the Act was not required because the number of offerees, their “ability to fend for themselves” and access to information which would ordinarily be in a registration statement were sufficient to satisfy the private offering exemption of the Securities Act,⁵³ nonetheless, the Division could hinder considerably the proposed exchange offer by simply ordering an investigation pursuant to its powers under section 1707.09; this it could, of course, do before enactment of the Act.

It would appear from the language of the Act that an offer might be made lawfully to less than all the shareholders of a com-

⁵¹ *Id.* § 1707.041(A)(1)(b) (Page Supp. 1969).

⁵² *Id.* § 1707.09 (Page 1964).

⁵³ Securities Act § 4(2), 15 U.S.C. § 77d(2) (1964). See *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953).

pany to keep the offer within the private offering exemption.⁵⁴ Thus, if a company had a large number of shareholders, but a relatively small number of them held sufficient securities to deliver effective control to an offeror, the offeror might solicit the tenders of the limited number and ignore the remainder of the shareholders. Thus, it would appear that this provision countenances what appears to be still the common law rule, that, absent fraud or other improper conduct, an offer may be made to those in control of a corporation without a corresponding offer being made to other shareholders.⁵⁵ Despite the strong misgivings of law review authors concerning this conduct,⁵⁶ neither state corporation law⁵⁷ nor section 10(b) of the Exchange Act and Rule 10b-5⁵⁸ promulgated thereunder require that the same offer be made to all shareholders as is made to controlling shareholders. Thus, conduct which in the eyes of many writers is regarded as unfair and unconscionable, would appear to be sanctioned, even encouraged, by this express exemption from the definition of takeover bid.

Presumably the requirement that the transaction be in "good faith" is intended to inhibit an offer of a redeemable security which is closely followed by a redemption, thereby changing an exchange offer into a cash tender offer; however, as noted below, a cash tender offer might be made to a larger number of offerees than an exchange offer. It would not seem to be "bad faith" to limit the offer to less than all shareholders of the target company. The question might be raised whether such conduct was "for the purpose of avoiding this section," but it would appear that an effective argument could be made that rather than seeking to avoid the section, such an offer was in strict compliance with it.

Despite the exemption of this kind of transaction from the scope of takeover bid, nonetheless, it would appear that unless an exchange offer could be registered by a description under section 1707.06⁵⁹ (an unlikely possibility given the typical characteristics of exchange offers), or unless an exemption were available

⁵⁴ CODE § 1707.041(A)(1)(b) (Page Supp. 1969).

⁵⁵ See *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962).

⁵⁶ See, e.g., Andrews, *The Stockholders' Right to Equal Opportunity in the Sale of Shares*, 78 HARV. L. REV. 505 (1965).

⁵⁷ See *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962).

⁵⁸ Exchange Act § 10(b), 15 U.S.C. § 78j(b) (1964); SEC Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5 (1969), reprinted in 2 CCH FED. SEC. L. REP. ¶ 26,744, at 20,061-3. See *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952); *Cristophides v. Proco*, 289 F. Supp. 403 (S.D.N.Y. 1968).

⁵⁹ CODE § 1707.06 (Page 1964).

(e.g., the security offered was listed on an exchange),⁶⁰ the offeror would be required to qualify as a dealer and secure a dealer's license unless the offer was made through a licensed dealer. It should be noted that in any instance in which a dealer's license is required, it is necessary that at least one principal of the dealer take an examination, even though the nature of the license is "restricted" and confined to a particular series of transactions.⁶¹

(3) Also excluded from the definition of takeover bid is "any other offer to acquire an equity security, or the acquisition of such equity security pursuant to such offer, for the sole account of the offeror, from not more than fifty persons, in good faith and not for the purpose of avoiding this section."⁶² This subsection appears to be confined to cash and cash plus securities tender offers. Unlike the vagaries of the numbers of those to whom an offering may be made and still enjoy the benefits of the private offering exemption under the Securities Act, this subsection has the merit of certainty; however, it leaves uncertain whether more than one individual may be aggregated to constitute an offeree.⁶³ Since 25 offerees is considered something of a benchmark for a private offering under federal law,⁶⁴ it would appear that a cash offer might be more safely made to a larger number than an exchange offer. The subsection, however, does not require that the same offer be made to all shareholders of the target company; instead the offeror might approach the 50 largest shareholders of a corporation and offer to purchase their securities, which purchases might well afford it control. It appears this subsection also applies to combined cash and securities exchange offers; thus, the offering might not be entitled to the private offering exemption for federal purposes but would be entitled to this exemption.

(4) The most questionable exemption from the scope of takeover bids is the one that exempts a tender offer or invitation for tenders to which the target company *consents* by action of its

⁶⁰ *Id.* § 1707.02(E)(1).

⁶¹ *Id.* § 1707.15(G).

⁶² *Id.* § 1707.041(A)(1)(c) (Page Supp. 1969).

⁶³ In some contexts, more than one individual constitutes a "person." E.g., SEC Securities Act Rule 154, 17 C.F.R. § 230.154 (1969), reprinted in 1 CCH FED. SEC. L. REP. ¶ 5725, at 5062. See Securities Act Release No. 4669 (Feb. 26, 1964), in 1 CCH FED. SEC. L. REP. ¶ 2920, at 2709. Under the "Wheat Proposals," contained in Securities Act Release No. 4997 (Sept. 15, 1969), reprinted in CCH Special Report No. 272 (Extra Edition Sept. 6, 1969), the identity of those to be aggregated is specified with unusual exactitude (proposed Rule 162(b)).

⁶⁴ See Securities Act Release No. 285 (Jan. 24, 1935), in 1 CCH FED. SEC. L. REP. ¶ 2740, at 2676; H.R. REP. NO. 1542, 83d Cong., 2d Sess. 19 (1954).

board of directors, provided the board recommends acceptance and the terms of the offer, "including any inducements to officers or directors which are not made available to all shareholders," are furnished to shareholders.⁶⁵ In commenting on the original provision which would have given the Division discretion to exempt a proposed takeover bid when the target company by action of its board of directors consented to the offeror's proposal and recommended that its shareholders accept it, Ronald J. Coffey, Associate Professor of Law at Case Western Reserve University, stated in a memorandum addressed to the sponsors of the bill:

Although under Subsection (F), the Division of Securities is not compelled to exempt a take-over bid which is approved and recommended by the management of a target company, there is at least a statutory indication that approval by management somehow carries with it a reduction of the need for adequate disclosure to the shareholders of the target company. One wonders why. This exemptive provision raises what can amount to a statutory authorization or a sanction of conflict of interest situations. If management of the target company strikes a deal with the offeror, then the chances of an exemption are enhanced, even though such circumstances may create even greater reason for disclosure to the target company shareholders.⁶⁶

The provision as finally amended makes the exemption absolute and not subject to the Division's discretion, but it provides that there must be disclosure of any inducements made to management. Despite these modifications, recommendation by the board of directors of a target company avoids the necessity of submitting to the target company and the Division all of the extensive information required under subsection (B) (3) of the Act⁶⁷ and avoids all necessity for an offeror to satisfy the Division that its proposed disclosures to shareholders of the target company are "fair, full, and effective." The exemption appears to be based on the assumption that where the board of directors of the target company has approved the offer the only information material to a shareholder is whether management has been offered some inducement, a peculiar reduction in the otherwise required scope of disclosure. Since this is an absolute exclusion from the scope of takeover bids, in the case of cash tender offers the Division has no other authority to regulate the scope of disclosures; in the case of exchange offers, it has only the power to make certain deter-

⁶⁵ CODE § 1707.041(A)(1)(d) (Page Supp. 1969).

⁶⁶ Memorandum accompanying letter to Hon. William W. Taft dated Apr. 3, 1969.

⁶⁷ CODE § 1707.041 (B) (3) (h) (Page Supp. 1969).

minations under which it could conceivably require some disclosure.⁶⁸ However, in the face of the fairly explicit legislative assertion that disclosure of anything other than inducements is unnecessary when a tender offer has the approval of the board of directors of the target company, it is unlikely that the Division would impose any such requirements.

It is not enough to qualify for this exemption that the board of directors "consent" to the offer; they must "recommend acceptance." In many instances the directors may be quite willing to submit the offer to shareholders, but unwilling to express an opinion with respect to its acceptability. In this case, presumably the tender offer becomes a takeover bid and subject to the other provisions of the statute.

A recent Illinois case has implied that directors have a fiduciary responsibility in the face of a tender offer to state whether they recommend such offer to the shareholders or not,⁶⁹ and the suggestion has been made that the SEC adopt such a requirement pursuant to its rulemaking power under the provisions of the Williams Act.⁷⁰ There is no such affirmative obligation on directors under this statute, and apparently none under Ohio case law.

B. Offeror

The term "offeror" is defined as "a person who makes, or in any way participates or aids in making a take-over bid, and includes persons acting jointly or in concert or who intend to exercise jointly or in concert any voting rights attached to the securities for which such take-over bid is made."⁷¹ A defender of the Act has stated that this language is intended to embrace the officers, directors, and perhaps shareholders of the offeror company,⁷² but it appears that the language may be construed to embrace others besides them, including those who participate or aid in making the bids. For instance, what of newspapers which carry advertisements in connection with the tender offer; have they an obligation to see to it that the necessary filings are made and that the determi-

⁶⁸ *Id.* § 1707.09(D) (Page 1964), gives the Division the power to determine, *in ter alia*, whether the offering is on grossly unfair terms.

⁶⁹ *Northwest Indus., Inc. v. B.F. Goodrich Co.*, 301 F. Supp. 706 (E.D. Ill. 1969).

⁷⁰ See *PLI CORPORATE LAW & PRACTICE TRANSCRIPT, TEXAS GULF SULPHUR — INSIDER DISCLOSURE PROBLEMS* 462 (Series No. 1, 1968) (A. Fleischer & J. Flom eds. 1968) (comments of W. McNeil Kennedy).

⁷¹ *CODE* § 1707.041(A)(2) (Page Supp. 1969).

⁷² *Vorys, supra* note 11, at 69.

nations required before an offer is made have been made by the Division, and may they be held liable for misconduct of the principal offeror? Similarly, what of brokers who simply transmit the offer to beneficial owners of securities held in their name; what are the limitations of their liability? This provision is apparently intended to extend the embrace of the law in a manner somewhat similar to section 13(d)(2) of the Exchange Act which states that "[w]hen any two or more persons act as a partnership, limited partnership, syndicate or other group for the purpose of acquiring, holding or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for the purpose of this subsection."⁷³

C. *Offeree*

"Offeree" is defined as "the beneficial or record owner of securities which an offeror acquires or offers to acquire in connection with a take-over bid."⁷⁴ Presumably, because of the inclusion of both beneficial and record owners within the term offeree, in the event of a hearing before the Division it would be necessary for the offeror to demonstrate the manner in which it proposed to make disclosure to beneficial owners since the Act requires an adjudication by the Division that "the offeror proposes to make fair, full, and effective disclosure to *offerees*."⁷⁵ Presumably an expression of intent to furnish to record owners solicitation materials, together with reimbursement for the expenses of forwarding them to beneficial owners, would suffice.⁷⁶

D. *Target Company*

"Target company" is defined as "a corporation whose securities are or are to be the subject of a take-over bid."⁷⁷ Use of this term is unusual and would lead one to believe that it was chosen less for its descriptive merits than for its emotional overtones. Nonetheless the definition is simple and straightforward, except for the failure to qualify the word "securities" with the word "equity," which would be consistent with the remainder of the statute.

⁷³ Exchange Act § 14(d)(2), 15 U.S.C. § 78n(d)(2) (Supp. IV, 1969).

⁷⁴ CODE § 1707.041(A)(3) (Page Supp. 1969).

⁷⁵ *Id.* § 1707.041(B)(1)(c) (emphasis added).

⁷⁶ N.Y. Stock Exch. Rule 451, *reprinted in* 2 CCH N.Y. STOCK EXCH. GUIDE § 2451, at 3805.

⁷⁷ CODE § 1707.041(A)(4) (Page Supp. 1969).

E. *Equity Security*

"Equity security" is defined in the broadest possible terms and includes "any shares or similar securities, or any securities convertible into such shares or similar securities or carrying any warrant or right to subscribe to or purchase such securities, or any such warrant or right, or any other security which, for the protection of security holders, is treated as an equity security pursuant to regulations of the Division of Securities."⁷⁸ The Legislative Service Commission remarked:

[This definition] appears too broad for its purpose. A reading of the bill leads to the conclusion that the only securities relevant to its purpose are those carrying rights through which effective control of a corporation might be gained. The bill, however, defines equity security to include, literally *any* security. "Security" can mean a mortgage, bond, debentures, non-voting preferred stock, and any other debt or equity paper, as well as voting stock. Since the definition of equity security thus embraces many types of securities which could not be used to gain control, it might be well to tighten it up so as to include only securities which can be used for this purpose and are therefore relevant to the bill.⁷⁹

This comment would appear to be well-founded. The breadth of definition of equity security results in a number of anomalies. For instance, there is a takeover bid if after the acquisition by tender offer is completed the offeror would be the record or beneficial owner of more than 10 percent of any class of the issued and outstanding equity securities of the target company. However, as will be discussed below, the offeror is disqualified from making a takeover bid for a period of time if he owns 5 percent or more of the issued and outstanding equity securities of any class of the target company and did not disclose at the time of acquisition his intent to acquire control. Thus, an offeror who acquired 5 percent of a small class of warrants outstanding might be precluded from making a tender offer addressed to the common shares of the company, even though his ownership of the warrants afforded him negligible progress toward control. Similarly, limited ownership of preferred stock of a corporation would breed the same result.

III. PROCEDURAL PROVISIONS

The statute describes in considerable detail, but with some puzzling hiatuses, the procedure which must be followed by an of-

⁷⁸ *Id.* § 1707.041(A)(5).

⁷⁹ Legislative Service Commission, *supra* note 24.

feror in making a takeover bid. It provides that the takeover bid may not be made unless the offeror at least 20 days prior to the commencement of it announces publicly the terms of the proposed bid *and* files with the Division and the target company information specified in the statute;⁸⁰ during this period no solicitation activities may be engaged in. The bid may be commenced 20 days after the announcement and filing only if one of three events occurs:

(A) Within ten days following such filing no hearing is ordered by the Division or requested by the target company;

(B) A hearing is requested by the target company within such time but the Division finds that no cause for a hearing exists;

(C) A hearing is ordered within such time and upon such hearing the Division adjudicates that the offeror proposes to make fair, full, and effective disclosure to offerees of all information material to a decision to accept or reject the offer.⁸¹

If a hearing is ordered it must be held within 40 days after the date the offeror filed the required information with the Division and with the target company (that is, within 20 days after the offer would otherwise have begun); the adjudication by the Division must be made within 60 days after the filing (20 days or more after commencement of the hearing), and it must be held pursuant to *Code* sections 119.01 to 119.13⁸² (the Administrative Procedure Act). The target company is required to pay the Division \$250 upon application for a hearing and must deposit a sum not exceeding \$750 to defray the cost of the hearing and any investigation which the Division may make in connection with the application.⁸³

If the Division finds that the proposed offer violates section 1707 or that effective provision has not been made for full and fair disclosure to the offerees of material information, it shall so adjudicate; if it finds that the offer would comply with the Act if amended in certain respects, it shall so adjudicate; and, if it finds that the takeover bid does not violate section 1707 and that effective provision is made for fair and full disclosure to offerees of all information material to their decision to accept or reject the bid, it shall so adjudicate.⁸⁴ This procedure is replete with incongruities, inconsistencies, and unanswered questions.

First, it requires a *public* announcement of the terms of the

⁸⁰ CODE §1707.041(B)(1) (Page Supp. 1969).

⁸¹ *Id.*

⁸² *Id.* §§ 119.01-13 (Page 1969).

⁸³ *Id.* § 1707.041(B)(4) (Page Supp. 1969).

⁸⁴ *Id.*

proposed takeover bid, but does not tell what would constitute an adequate public announcement. Would this require ads in the *Wall Street Journal*, the *New York Times*, and/or the principal papers in Ohio? The Division has adopted Form 041 ("Form for the Filing of Information Pertaining to a Take-over Bid Pursuant to Section 1707.041 of the Revised Code of Ohio"), which requires that "publication shall be made in a newspaper of general circulation in Franklin County, Ohio" (the county in which Columbus, the capitol, is located). It does not appear that this requirement, which has all the earmarks of a rule, was adopted by any formal procedure. What is the purpose of a public announcement? Would it not be sufficient to provide that the proposed terms simply be transmitted to the shareholders of the target company and correlatively that the target company be obliged to furnish a shareholders list to the offeror or alternatively transmit the terms to its shareholders?

An offeror making an exchange offer would, of course, have to be wary lest his compliance with the Ohio legislation entailed violation of the federal securities laws, as well as other state blue sky laws. Under that Act it is unlawful to make an offer of a security prior to the filing of a registration statement, and after the filing only specified writings may be circulated.⁸⁵ The SEC and the courts have been vigilant in construing this requirement broadly.⁸⁶ The SEC has adopted Rule 135 under the Act which permits, in the case of exchange offers, limited communications with the holders of securities for which an offer is made. A communication within the rule may state "the name of the issuer and the title of the securities to be surrendered in exchange for the securities to be offered, the basis upon which the exchange is proposed to be made and the period during which the exchange may be made."⁸⁷

While Rule 135 would appear to be broad enough to permit a statement of the terms of the takeover bid, there may be some question concerning the breadth of the disclosure. The Rule contemplates disclosure to the holders of the securities sought, while the Ohio Act contemplates a "public" announcement. Presumably

⁸⁵ Securities Act §§ 5 (b) (1), (c), 15 U.S.C. §§ 77e(b) (1), (c) (Supp. IV, 1969).

⁸⁶ *Chris-Craft Indus., Inc. v. Bangor Punta Corp.*, [Current Binder] CCH FED. SEC. L. REP. ¶ 92,648, at 98,888 (2d Cir. Apr. 28, 1970) (en banc); SEC Securities Act Release No. 3844 (Oct. 8, 1957), reprinted in 2 CCH FED. SEC. L. REP. ¶ 3250, at 3108.

⁸⁷ SEC Rule 135, 17 C.F.R. § 230.135 (1969), reprinted in 1 CCH FED. SEC. L. REP. ¶ 3012, at 3053.

the SEC would take a pragmatic view of this and permit a disclosure identified as directed to the target company's shareholders which was accomplished through broader publication, as, for instance, in a newspaper.

The New York Stock Exchange, consistent with its position before Congress at the time the Williams Act was under consideration,⁸⁸ has criticized the requirement for such advance notification because of the disruptive effect it would have upon markets. In connection with this provision it stated in its comments to the Ohio House of Representatives:

While this would provide an extended period during which the Division could review the offer and entertain protests by the target company management, it would also create difficult conditions in the market for the target company's stock. During the 20-day period there could be rumors, counter-offers and rumors of counter-offers which may result in price fluctuations to the extent that the market in the stock would be disrupted. This may make it necessary for the Exchange to temporarily halt trading in the stock. In some cases trading may be halted for the duration of the 20-day period. The impact of the Ohio law would thereby be felt by investors throughout the Nation who would be deprived of a market for the securities they hold in the Ohio company.⁸⁹

The Exchange underestimates the peril this legislation poses for markets. It is not a period of 20 days during which uncertainties may stir the market. If a hearing is ordered, that 20-day period would in all probability extend to 60 days, the time within which the Division is supposed to make its adjudication, and in all probability long beyond that as a consequence of appeals, motions for rehearing, and the like.

Although these procedural requirements establish standards (inconsistent to some extent as will be seen below) for determination as to whether the tender offer will be permitted, no such standards are provided for determining whether, when a target company has made an application for a hearing, cause for a hearing exists. Is the standard to be comparable to that justifying a preliminary injunction — a probability that on final determination it would be determined that fair, full, and effective disclosure is not proposed to be made by the offeror? Although in other respects time limits for action are set forth with particularity, there is no limitation on the time by which the Division must

⁸⁸ See N.Y. Times, Apr. 2, 1967, § F, at 16, col. 3.

⁸⁹ Statement by the New York Stock Exchange on Amend. Sub. S.B. No. 138, File No. 90 (Reg. Sess. 1969-70), May 9, 1969.

make its determination that no cause for hearing exists, although an order for a hearing must be made in writing 10 days following the filing⁹⁰ and the hearing would have to commence within the 40-day period specified.⁹¹

If a hearing is ordered, it is clear that this order must be made "within such time"⁹² which apparently refers back to 10 days following the filing by the offeror.⁹³ While this provision has the merit of certainty, nonetheless its relationship to the other provisions concerning the ordering of a hearing is unusual. The order for a hearing may be made either by the Division on its own motion or at the request of the target company. The target company has 10 days from the time of filing within which to make its request and the Division has 10 days from the date of filing within which to order a hearing.⁹⁴ What, one may ask, results if at the last moment of the 10th day after filing the target company requests a hearing: must the Division *instantly* make its determination whether there shall be a hearing? If it does not, can the Division thereafter order a hearing?

The statute is silent with respect to the status of an order by the Division for a hearing; for instance, is it an appealable order?⁹⁵ Further, may the Division in connection with making this determination conduct an investigation and subpoena witnesses, and if so, what other procedural provisions are applicable? Examination of the Ohio Securities Law describing the Division's powers in these particulars leaves a question mark.⁹⁶

Subsection 1707.041(B)(1) provides that an offer may commence if the offeror has publicly announced the terms of the proposed takeover bid, has filed with the Division and the target company copies of the required information, a hearing either has not been ordered, or has been ordered within 10 days after filing and the Division has adjudicated that the offeror proposes to make fair

⁹⁰ CODE § 1707.041(B)(1)(b) (Page Supp. 1969).

⁹¹ *Id.* § 1707.041(B)(4).

⁹² *Id.* § 1707.041(B)(1)(c).

⁹³ *Id.* § 1707.041(B)(1)(a).

⁹⁴ *Id.*

⁹⁵ Bearing on this question is whether such an order is an "adjudication" as defined in *Code* section 119.01(D). If it is, then a number of procedural consequences follow under the Administrative Procedure Act (sections 119.01-13), including applicability (section 119.12).

⁹⁶ The Division's powers are detailed in *Code* sections 1707.23-.27. Certain of the powers described therein might be used in connection with a determination of whether cause for a hearing exists, but given the short time within which the decision must be made, as a practical matter, many of them may be useless.

and full disclosure to the offerees of all information material to a decision to accept or reject the offer.⁹⁷ It is not a condition that the Division shall have adjudicated that the offer is, in the case of an exchange offer, not, for instance, "on grossly unfair terms" or that the offer complies in any other way with the provisions of the Act or with chapter 1707 as a whole. However, subsection 1707.041(B)(4) provides for a different adjudication, namely, that the takeover bid is in violation of chapter 1707 of the *Code* or that effective provision is not made for fair and full disclosure to offerees of all information material to a decision to accept or reject the offer.⁹⁸ Thus the anomaly: suppose the Division adjudicates that the takeover bid is in violation of chapter 1707 in other respects (*e.g.*, on grossly unfair terms) but that effective provision is made for fair and full disclosure to offerees? In such a situation subsection 1707.041(B)(1) creates the impression that, assuming the necessary filings have occurred, the only remaining necessary condition to commencement of the bid has occurred, namely, a hearing at which the Division adjudicates that the offeror proposes to make fair, full, and effective disclosure. In practice undoubtedly the adjudication by the Division would be sufficiently broad to avoid this contradiction, but nonetheless it is buried in the statute.

Subsection 1707.041(B)(4) also provides that the Division may find that the takeover bid would comply with the section if amended in certain respects, and that it may so adjudicate.⁹⁹ Since this subsection empowers the Division to adjudicate not only that effective provision is not made for fair and full disclosure, but also that the takeover bid is in violation of chapter 1707, it would appear clearly implied that the amendments upon which approval might be conditioned could be of various sorts. It might be required that the proposed disclosures to offerees be amended, or that the terms of the bid be changed since the terms, if "grossly unfair," might in the case of an exchange offer constitute a violation of chapter 1707.¹⁰⁰

No provision is made for resolving problems that may be posed if there is an adjudication that the takeover bid would comply with the section if amended in certain respects. Is it required that, if the terms of the bid must be amended, the amended terms be publicly

⁹⁷ CODE § 1707.041(B)(1) (Page Supp. 1969).

⁹⁸ *Id.* § 1707.041(B)(4).

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 1707.13 (Page 1964).

disclosed, that amended filings be made with the Division and that 20 days expire before commencement of the offer? Or is it intended that immediately upon amendment the offer may commence? If the amendment is in the terms, and if, as it appears, the legislature felt it desirable that publicity be given to the original terms 20 days in advance of the offer, may it not be argued that a similar period of publicity should be given to amendments to the terms?

Finally, subsection 1707.041(C) of the Act provides that *Code* section 1707.14, requiring that only licensed dealers engage in the business of buying and selling securities, must be complied with. Hence, either the person seeking the securities must become a licensed dealer, or the services of an Ohio-licensed dealer must be procured. This provision, of course, provides a large measure of control over the manner in which the offer can be carried out, since the Division has broad control over the conduct of dealers.

IV. INFORMATION TO BE FILED

The statute details the information which must be filed with the Division and the target company 20 days in advance of the proposed commencement of the offering. Virtually all of the required information parallels information required by either the Williams Act (Schedule 13D)¹⁰¹ or the Securities Act (Form S-1).¹⁰² The original proposal submitted to the legislature provided that there be filed with the Division and the target company "copies of all information which such offeror intends to make public or to transmit to offerees in connection with such take-over bid," but it contained no other description of the information which would have to be filed or disclosed to offerees.¹⁰³ It was felt by many that giving the Division the power to determine that the proposed disclosures were not fair, full, and effective without specifying the disclosures to be made or the standards to which they would have to conform created the danger of serious abuse. The Division could theoretically find that any disclosure, no matter how comprehensive or extensive, in some particular or other failed to comply with the fair, full, and effective standard. Thus, it was proposed that the required disclosures be set forth specifically. As a result of this there is an extensive delineation of the informa-

¹⁰¹ SEC Exchange Act Schedule 13D, 17 C.F.R. § 240.13d-101 (1969), *reprinted in* 2 CCH FED. SEC. L. REP. J 26,853, at 20,107-4.

¹⁰² SEC Securities Act Form S-1, 17 C.F.R. § 239.11 (1969), *reprinted in* 1 CCH FED. SEC. L. REP. J 7122, at 6201.

¹⁰³ S.B. No. 138 (Reg. Sess. 1969-70) (Original Draft).

tion which must be filed with the Division and the target company, ending with the requirement that there also be filed "such other and further documents, exhibits, data, and information as may be required by regulation of the Division, or as may be necessary to make fair, full, and effective disclosure to offerees of all information material to a decision to accept or reject the offer."¹⁰⁴ Thus, the efforts of those seeking to limit the discretion of the Division resulted in the creation of an explicit extensive pattern of disclosure, but with a continued vesting in the Division of the very discretion their proposals attempted to avoid!

The following is a summary of the information required to be filed.

(1) "Copies of all prospectuses, brochures, advertisements, circulars, letters, or other matter by means of which the offeror proposes to disclose to offerees all information material to a decision to accept or reject the offer."¹⁰⁵ If these documents must be filed 20 days in advance of commencement of the takeover bid, may any follow-up literature be used during the period of the offering which was not submitted at the time of the original filing? As is frequently the case in tender offers, the offeror desires to counter the efforts of management to dissuade tendering by shareholders, and obviously such literature to be responsive to the arguments of management could only be prepared after commencement of the tender offer. Does this section preclude use of such material? It may be suggested that it does not, since the written material to be submitted is that which discloses to offerees *all* information material to a decision to accept or reject the offering.¹⁰⁶ Presumably it is possible prior to the commencement of the offering to make a determination of which information is material to a decision with subsequent mailings containing only rebuttal arguments but no new information material to the offeree's decision. However, it can be argued to the contrary that as a consequence of assertions made by management additional information may become material which would not have been reasonably deemed to be material prior to the publicity of management. Quite obviously if the offeror is precluded from using any written material in connection with his solicitation other than that which was submitted prior to commencement of the tender offer, he will be gravely disadvan-

¹⁰⁴ CODE § 1707.041(B)(3)(h) (Page Supp. 1969).

¹⁰⁵ *Id.* § 1707.041(B)(3)(a).

¹⁰⁶ *Id.* § 1707.041(B)(3)(h).

taged vis-à-vis management, which will be able to counter his solicitation with information and arguments not subject to review by the Division under this or any other statute and not subject to effective rebuttal by the offeror.¹⁰⁷

(2) "The identity and background of all persons on whose behalf the acquisition of *any* equity security of the target company has been or is to be effected."¹⁰⁸ Literally applied this would require information for an indefinite period concerning transactions and people having nothing whatsoever to do with the takeover bid; presumably in practice its application would be appropriately limited. This requirement parallels Item 2 of Schedules 13D and 14D.¹⁰⁹ It is possible that the persons on whose behalf the acquisition is to be made are not coextensive with "offeror" and obviously great care would need to be exercised to insure the avoidance of a material omission.

(3) "The source and amount of funds or other consideration used or to be used in acquiring *any* equity security, including a statement describing any securities, other than the existing capital stock or long term debt of the offeror, which are being offered in exchange for the equity securities of the target company."¹¹⁰ This has its origin in Item 3 of Schedule 13D but significantly omits the requirement in that schedule of information concerning the source of *borrowed* funds, a provision which was objected to at the time of adoption of the Williams Act on the grounds that it might unfairly inhibit borrowing by offerors because it would expose the target company's lenders to considerable pressure.¹¹¹ In view of the manifest purpose of this legislation to protect target com-

¹⁰⁷ It should be noted that SEC Rule 14d-4, 17 C.F.R. § 240.14d-4 (1970), *reprinted in* 2 CCH FED. SEC. L. REP. § 26,887, at 20,152, requires that where a tender offer is subject to Exchange Act § 14(d) [15 U.S.C. § 78n(d) (Supp. IV, 1969)], the target company may have to file a Schedule 14D. However, no pre-use clearance analogous to the Ohio Act is embodied in the federal procedure. Lack of target company compliance would subject it to post-use SEC injunctive action under section 21 (e) of the Exchange Act [15 U.S.C. § 78u (e) (1964)], criminal penalties under section 32 [*id.* § 78ff], and possibly civil liability based upon the offeror's implied right of action under section 32. This control over the target's actions exists, however, only when the offer is for cash and the target is a company which is required to register under section 12 of the Exchange Act. *Id.* §§ 78n(d)(1), (d)(8).

¹⁰⁸ CODE § 1707.041(B) (3) (b) (Page Supp. 1969) (emphasis added).

¹⁰⁹ SEC Exchange Act Schedule 13D, Item 2, 17 C.F.R. § 240.13d-101 (1969), *reprinted in* 2 CCH FED. SEC. L. REP. § 26,853, at 20,107-4; SEC Exchange Act Schedule 14D, Item 2, 17 C.F.R. § 240.14a-101 (1969), *reprinted in* 2 CCH FED. SEC. L. REP. § 24,031, at 17,578.

¹¹⁰ CODE § 1707.041(B) (3) (c) (Page Supp. 1969) (emphasis added).

¹¹¹ Manne, *Cash Tender Offers for Shares — A Reply to Chairman Cohen*, 1967 DUKB L.J. 231; Manne, *Salute to "Raiders"*, Barton's, Oct. 23, 1967, at 18.

panies, it is surprising that it does not make provision to afford them this information.

(4) "A statement of any plans or proposals which the offeror, upon gaining control, may have to liquidate the target company, sell its assets, effect a merger or consolidation of it, or make any other change in its business, corporate structure, management personnel, or policies of employment."¹¹² This provision has its origins in Item 4 of Schedule 13D, but in several particulars it departs from this item and exposes the parochial thrust of the Act. The requirement assumes that the purpose of the takeover bid is to acquire control, for it says that the offeror shall include in the information filed "a statement of any plans or proposals which [are contemplated by] the offeror upon gaining control."¹¹³ It is unlike the comparable disclosure provision in the Williams Act which states "*if the purpose of the purchases or prospective purchases is to acquire control* of the business of the issuer of the securities."¹¹⁴ The definition of takeover bid relates only to a tender offer which if accomplished would give the offeror more than 10 percent of any class of equity security of the target company;¹¹⁵ nowhere is mention made of the intention to acquire control as a constituent element of a takeover bid. While it is true that in the overwhelming number of instances the purpose of a tender offer is to secure control, nonetheless this is not a foregone conclusion.

The most significant litigation under the Williams Act thus far has focused upon Item 4 of Schedule 13D. In *Electronic Specialty Co. v. International Controls Corp.*,¹¹⁶ the target company alleged that this statement in response to Item 4 was inadequate: "Upon completion of this Offer, the Company will give consideration to a merger between itself or a subsidiary and Specialty."¹¹⁷ It contended that this did not adequately convey the intention of the offeror, which according to *Electronic Specialty*, was to effect such a merger. The court held that in view of the state of facts that existed at the time the statement was made it was sufficient.

A similar claim that the response to Item 4 was insufficient was asserted in connection with the tender offer of *Susquehanna*

¹¹² CODE § 1707.041(B)(3)(d) (Page Supp. 1969).

¹¹³ *Id.*

¹¹⁴ SEC Exchange Act Schedule 13D, Item 4, 17 C.F.R. § 240.13d-101 (1969), reprinted in 2 CCH FED. SEC. L. REP. ¶ 26,853, at 20,107-4 to -5 (emphasis added).

¹¹⁵ CODE § 1707.041(A)(1) (Page Supp. 1969).

¹¹⁶ 409 F.2d 937 (2d Cir. 1969).

¹¹⁷ *Id.* at 942-43.

Corp. for stock of Pan American Sulphur Co. Again, the question was the intention of the tender offeror with regard to the future of the target company. The district court¹¹⁸ and a SEC hearing examiner¹¹⁹ determined that the disclosure was insufficient, but the court of appeals reversed the district court and held that under the circumstances there had been compliance with Item 4.¹²⁰

Both Item 4 of Schedule 13D and the Ohio Act require (in the case of the federal law, if the purpose is to acquire control), description of any plans or proposals which the purchasers may have to liquidate the issuer, to sell its assets or to merge it with any other person, or to make any other major change in its business or corporate structure. The Ohio legislation requires in addition disclosure of "plans or proposals which the purchaser may have to make any other major change . . . in management personnel or policies of employment."¹²¹ Thus an offeror contemplating changes in management or a cut-back of work forces, among other things, would have to disclose these plans, though it would appear such information would be of relevance to executives and communities where plants are located, but not necessarily to shareholders. This provision would appear to be related to the statement of State Representative Richard G. Reichel of Massillon, Ohio, Floor Manager of S.B. 138 in the House, who told of the experience his community had when a large employer was "gobbled up by Philadelphia interests," with the result that general offices were closed in a short time and later the plant itself (employing 900 persons) was shut down.¹²²

The legislation, however, does not suffer from parochialism to the extent of the proposed Pennsylvania tender offer bill. This bill would require the Pennsylvania Securities Commission to make a determination that the proposed purchase of shares was "fair and equitable," and it provides that in making such determination the Commission should consider, among other things:

[W]hether it appears probable that a successful takeover would result in the complete or partial closing of plants and offices within the Commonwealth resulting in unemployment within the Com-

¹¹⁸ *Pan American Sulphur Co. v. Susquehanna Corp.*, [Current Binder] CCH FED. SEC. L. REP. ¶ 92,473, at 98,233 (W.D. Tex. May 28, 1969).

¹¹⁹ *In re Susquehanna Corp.*, [Current Binder] CCH FED. SEC. L. REP. ¶ 77,471, at 83,692 (SEC Hearing Examiner Aug. 5, 1969).

¹²⁰ *Pan American Sulphur Co. v. Susquehanna Corp.*, [Current Binder] CCH FED. SEC. L. REP. ¶ 92, 610 at 98,749 (5th Cir. Mar. 13, 1970).

¹²¹ CODB § 1707.041(B)(3)(d) (Page Supp. 1969).

¹²² Vorys, *supra* note 11, at 68.

monwealth [W]hether it appears likely that a successful takeover will reduce the tax revenue to the Commonwealth to the detriment of the citizens of the Commonwealth [W]hether the acquiring person has made adequate provision for the funding and payment of all pension and insurance obligations of the corporation whose securities are proposed to be acquired.¹²³

(5) "The number of shares of any equity security of the target company of which each offeror is beneficial or record owner or has a right to acquire, directly or indirectly, together with the name and address of each person defined in this section as an offeror."¹²⁴ This is based upon Item 5 of Schedule 13D, although it does not appear to be as inclusive as that Item.

(6) "Particulars as to any contracts, arrangements, or understandings" concerning equity securities of the target company must be described.¹²⁵ This has its origin in its entirety in Item 6 of Schedule 13D.

(7) "Complete information on the organization and operations of the offeror, including . . . year of organization, form of organization, jurisdiction in which it is organized [based on Item 7 of Form S-1], a description of each class of offeror's capital stock and of its long-term debt [Items 13 and 14 of Form S-1] . . . a brief description of the location and general character of the principal physical properties of offeror and its subsidiaries [Item 10 of Form S-1], a description of pending legal proceedings [Item 12 of Form S-1] . . . a brief description of the business done and projected by the offeror and its subsidiaries and the general development of such business over the past five years [Item 9 of Form S-1], the names of all directors and executive officers together with biographical summaries of each for the preceding five years to date [based upon Item 16 of Form S-1, but encompassing substantially more than that, such as "biographical summaries" for both officers and directors which clearly denotes more than the principal occupations for 5 years for officers and the present principal occupations of directors as required by Item 16], and the approximate amount of any material interest, direct or indirect, of any of the directors or officers in any material transaction during the past three years, or in any proposed material transactions, to which the offeror or any of its subsidiaries was or is to be a party [based on Item 20 of Form

¹²³ Pennsylvania H.B. No. 841, § 4(3) (1969 Sess.).

¹²⁴ CODE § 1707.041(B)(3)(e) (Page Supp. 1969).

¹²⁵ *Id.* § 1707.041(B)(3)(f).

S-1, but unlike Item 20 it does not require disclosure of such interests of 10 percent shareholders]."¹²⁶

(8) "Financial statements for the current period and for the three most recent annual accounting periods."¹²⁷ Form S-1 requires the inclusion of (1) audited statements of income for the registrant's three most recent fiscal years, (2) unaudited statements of income for "stub" periods in certain circumstances, (3) a 5-year summary of earnings, (4) an audited balance sheet as of the end of the most recent fiscal year, and (5) an unaudited balance sheet at the end of the "stub" period.¹²⁸

It would appear that the requirement of the Ohio Act in some respects goes beyond the requirements of Form S-1, and in others is less demanding. What is meant by "financial statements for the current period"? Presumably financial statements for a current period are not available until that period ends. Perhaps this means interim statements for portions of the fiscal year completed — but how recent? Furthermore, in stating that there must be furnished "financial statements for the current period and for the three most recent annual accounting periods," does this mean that not only must income statements be furnished for these periods, but that statements of retained earnings and balance sheets with respect to them must also be furnished? Form 041 adopted by the Division seeks to eliminate much of this uncertainty by requiring a balance sheet not older than 6 months and a profit and loss statement for a year ended not more than 6 months previously. Obviously, this latter provision might entail preparing a statement for a year other than the offeror's normal fiscal year. Unlike Form S-1, however, it does not appear that any of the financial statements required need be audited, a peculiar omission considering the overall thrust of the statute.

It would have been desirable if the disclosure requirements of this statute had been framed so that in the case of an exchange offer registered with the SEC the submission of the prospectus or the registration statement might constitute complete compliance with the disclosure requirements. However, the departures from the requirements of Form S-1 are of such a nature that if strictly enforced a Form S-1 would not constitute full compliance.

¹²⁶ *Id.* § 1707.041 (B) (3) (g).

¹²⁷ *Id.*

¹²⁸ SEC Securities Act Form S-1, Item 21 & Instructions as to Financial Statements, 17 C.F.R. 239.11 (1969), *reprinted in* 1 CCH FED. SEC. L. REP. § 7122, at 6201.

It is evident, despite the assertion of a defender of the bill to the contrary,¹²⁹ that it is not the intention of the statute that all of the information required to be filed with the Division and the target company be furnished to shareholders of the target company. All that is required to be furnished to them is "information material to a decision to accept or reject the offer"¹³⁰ and it is required that there be "fair, full, and effective disclosure"¹³¹ of this information. As noted earlier, the original bill submitted required only that there be filed with the Division and the target company "copies of all information which such offeror intends to make public or to transmit to offerees in connection with such takeover bid."¹³² Those concerned with the carte blanche given to the Division for determining the information to be submitted were successful in securing amendment of the legislation to detail information to be filed with the target company and the Division, although to some extent their efforts were frustrated by the inclusion of a clause authorizing the Division to require "further documents, exhibits, data, and information."¹³³ However, despite all this, *the Act still lacks any definition or particularization of the information to be submitted to the shareholders of the target company!* The only standard is that it must consist of all information material to a decision to accept or reject the offer. Thus, the matter has come full circle and presumably the Division remains vested with complete power to determine how extensive or how limited the information which actually finds its way into the hands of the shareholders of the target company shall be.

If it is not intended that all of the information filed with the Division and the target company be placed in the hands of the shareholders, then it is difficult to understand why some of the information required to be submitted is so required. Those items derived from the schedules adopted under the Williams Act represent thoughtful responses to the question of what is relevant in the case of a cash tender offer. However, in many instances the information derived from Form S-1 is hardly material in the context of a cash tender offer, especially if it appears that there is no intention on the part of the offeror to accomplish any sort of a merger with the target company. Of what significance is it where

¹²⁹ Vorys, *supra* note 11, at 68.

¹³⁰ CODE § 1707.041(B)(3)(h) (Page Supp. 1969).

¹³¹ *Id.*

¹³² See text accompanying note 103 *supra*.

¹³³ CODE § 1707.041(B)(3)(h) (Page Supp. 1969).

the plants of the offeror are located or what their general character is or the nature of pending legal proceedings involving the offeror or its year of organization, form of organization, or jurisdiction in which it is organized, or a description of the offeror's capital stock and long-term debt? These are at best of marginal relevance.

One might conjecture that much of this disclosure is for the purpose of providing background information to be used by the Division in making its determination with regard to the quantity, quality, and character of disclosure proposed to be made to the shareholders, but even so much of it would appear to be superfluous. Similarly, it might be conjectured, particularly in view of the 20-day advance filing requirement, that the information is to be submitted to the target company so that it may have opportunity to amass arguments to be used in countering the tender offer.

V. SUBSTANTIVE PROVISIONS

The most unusual and most commented upon aspects of the Act are contained in its substantive provisions. Among these is the provision in subsection 1707.041(B)(2).¹³⁴ Under this provision anyone who owns more than 5 percent of any class of equity securities of a target company may not make a takeover bid if during the year preceding commencement of the bid he acquired any of such securities without either making fair, full, and effective disclosure to his seller or publicly announcing his intention to acquire control of the target company before making the purchase. It would appear that the purpose of this provision is to give a seller the option of holding his security in hopes that a to-be-expected tender offer may yield a better price for him. Commendable as this purpose may be, the section is a peculiar one and obviously will have benefits for the target company of substantial proportions.

The subsection requires disclosure in the described circumstances of the offeror's "intention to gain control of the target company."¹³⁵

¹³⁴ *Id.*, § 1707.041(B)(2). Mr. Vorys oddly misstates this provision: "Paragraph (2) of Division (B) establishes, as one of the criteria, the need for a purchaser of shares, should his shareholdings after such purchase constitute 5 percent or more of the shares of any class of the target company, to announce publicly his intention to make a takeover bid or otherwise make fair, full, and effective disclosure of such intention to all persons from whom he is then purchasing shares if thereafter within one year he wants to be permitted to make a take-over bid." Vorys, *supra* note 11, at 70. This interpretation, patently contrary to the words of the legislation, would not disqualify an offeror for failing to disclose his intentions in connection with any purchase other than the one that makes him a 5 percent holder and those thereafter.

¹³⁵ CODE § 1707.041(B)(2) (Page Supp. 1969).

This reiterates the draftsmen's assumption that anyone making a takeover bid is seeking control of the target company.¹³⁶ This assumption is obviously questionable and there have been instances in which solicitations for tenders were made by offerors not seeking control. Thus, in order to avoid sanitization of a takeover bid for a year, an offeror might be compelled under the terms of this statute to utter an untruth; namely, that he intended to seek control of the target company even though that was not his intention. Furthermore, even if at the time the takeover bid would be commenced the offeror had such an intention, it does not follow that it had that intention at the time it made all preceding acquisitions. For instance, assume that on July 1st company *A* acquired 100 shares of company *B*. Thereafter, sometime during the ensuing year it made a determination to acquire control of company *B*, so announced publicly, and accumulated in the market more than 5 percent of the common stock of company *B*. Not having made a public announcement of an intention or having disclosed to the seller of the 100 shares which it purchased on July 1st that it intended to gain control (since it did not have such an intention at that time), company *A* would be precluded from making a takeover bid until the following July 1st. This difficulty is compounded when the section is read against the breadth of the definition of "offeror." As noted, offeror includes anyone who participates in the making of a takeover bid.¹³⁷ Thus, if the broker employed by the would-be offeror made any purchase of shares of the target company, for anyone and for any purpose, without disclosing an intention to acquire control, either the takeover bid would be prohibited for a year from the time of such purchase or the offeror would have to dispense with the services of the broker.

From a narrowly technical standpoint the section suffers from other deficiencies. It speaks of one who "owns" more than 5 percent of a class of equity securities of a target company without specifying the nature of ownership, record or beneficial. Furthermore, the class of equity security of the target company which the offeror owns in excess of 5 percent need not be the same class as that with respect to which the takeover bid is made. Thus, ownership of more than 5 percent of a class of warrants outstanding

¹³⁶ The assumption is expressed in two subsections of the Act. *Id.* §§ 1707.041 (B) (2), (B) (3) (d). For a discussion of the latter, see text accompanying note 112 *supra*.

¹³⁷ See text accompanying note 71 *supra*.

or of a class of convertible debentures might effectively prevent the making of a takeover bid for common stock, even though the common stock into which the warrant or debenture is convertible would be an infinitesimal part of the total common stock of the target company and would afford little leverage on control.

From a practical standpoint, of course, anyone contemplating a tender offer on a company covered by the Act will be careful not to accumulate more than 5 percent of any class of equity security of the target company. It would appear that prevention of unpublicized accumulation is the real thrust of this provision; the only ones, then, who may be victimized by this provision are those who make acquisitions without an intent to acquire control and who later formulate such an intention and wish to make a takeover bid. Candor would surely have been better served if the legislature had simply required a public disclosure of holdings when anyone exceeded 5 percent ownership. At the present time Congress has under consideration an amendment to the Williams Act which would have the effect of requiring disclosure of holdings when they exceeded 5 percent rather than 10 percent as at present.¹³⁸ This proposal would also require a filing under the Williams Act if a tender offeror sought to acquire more than 5 percent of a class.

A further apparent inconsistency in this section of the Act is the use of 5 percent as the critical amount while 10 percent is the measuring rod in determining when a takeover bid must comply with the filing and disclosure requirements. Under federal law, accumulation disclosure provisions and the takeover bid provisions presently focus on the same amount, and the proposed amendments would continue to keep them consistent.

Obviously the alternative to public disclosure, "fair, full, and effective" disclosure to the seller, poses difficult problems, particularly when the purchase is in the organized securities markets. In that case, because of the difficulties of identifying the seller, public disclosure of intent may be the only course open to a would-be offeror, with possible adverse effects on the market. As was pointed out earlier,¹³⁹ the necessity of "fair, full, and effective" disclosure of an intention to acquire control limits only disclosure to the seller and does not limit public announcement; hence, presumably the standard to which public disclosure must conform is

¹³⁸ S. 3431, 91st Cong., 1st Sess. (1969).

¹³⁹ See text accompanying note 84 *supra*.

less rigorous than that to which private disclosure to a seller must adhere.

Admittedly "hotly contested in the Legislature"¹⁴⁰ was the provision incorporated in the bill that:

[N]o offeror shall make a take-over bid which is not made to all holders residing in this state of the equity security that is the subject of such take-over bid, or which is not made to such holders on the same terms as such take-over bid is made to holders of such equity security not residing in this state.¹⁴¹

At first blush this might seem to be a relatively toothless provision. Assume that an offeror made a takeover bid addressed to all shareholders in the other 49 states and simply refrained from making it in Ohio. What action could be taken under this law to frustrate the offer in the other 49 states? The ingenuity of the advocates of the bill sparkled most clearly in this provision. Their reasoning is best summarized by one of their number:

Section 1707.19 of the securities law provides for revocation of a dealer's Ohio license if he violates any of Ohio's securities laws. An out-of-state dealer, licensed in Ohio, who participates in a takeover bid for an Ohio or Ohio-based corporation will, pursuant to the definition of "Offeror" . . . be required to comply with the new law or risk losing his Ohio license. This, it seems to me, is the real deterrent to discrimination against Ohio shareholders by any out-of-state takeover bidder making a bid for an Ohio or Ohio-based corporation but excepting from his offer all shares held by Ohio residents.¹⁴²

While many would question the desirability of state tender offer legislation, few would question the interest of a state in protecting resident shareholders against unfair conduct. However, does this interest justify seeking to extend the consequences of such protection to the shareholders in all other 49 states? Recognizing the problems of policing offerors who chose to ignore Ohio in making tender offers, the sponsors of the bill sought at least to remove from the arena any dealers holding Ohio licenses and sought to exact as the penalty for participating in an offer that ignores Ohio shareholders the loss of their license. The word "arrogance" immediately leaps to mind as descriptive of this effort. Thus, if a corporation sought to make a takeover bid for a corporation organized in Ohio but with few shareholders in the state, it would nonetheless be a violation for the offer to be made in the other 49

¹⁴⁰ Vorys, *supra* note 11, at 70.

¹⁴¹ CODE § 1707.041 (C) (Page Supp. 1969).

¹⁴² Vorys, *supra* note 11, at 21.

states and not in Ohio. Lacking the practical means of getting at the offeror, the statute would permit getting at those who might be regarded as participating or aiding in making the bid, and if any of them happened to be licensed as dealers under the Ohio Securities Law they could be subjected to discipline, up to and including revocation of their licenses.

If the offeror does without the services of an Ohio-licensed dealer and makes its offer in the other states but not in Ohio, what would be the consequences for Ohio shareholders? They would either be totally denied the benefits of the offer, or, more likely, they would sell their shares in the market at a price reflecting the tender offer price, but somewhat below it, depending upon the expectations of the securities markets with respect to the outcome of the offer. The stock of the Ohio shareholder would undoubtedly end up in the hands of the arbitrageurs, who could be counted on to tender it in response to the tender. Hence, there would be two consequences: (1) The Ohio shareholder would receive something less than the shareholders in other states who could accept the tender offer, and (2) the probability of success of the tender offer would be promoted because the stock would reach persons almost certain to tender. The only loser — the Ohio shareholder.¹⁴³

In addition to these substantive provisions there are less controversial ones cribbed almost verbatim from the Williams Act. If the tender offer is for less than all outstanding equity securities of a class, and if more than the amount sought are tendered in the first 10 days, all tendered within that time must be accepted pro rata; the same provision applies with respect to those deposited within 10 days after an increase in consideration.¹⁴⁴ If the terms of the bid are changed before expiration by increasing the consideration offered, the offeror shall pay the increased considera-

¹⁴³ This posture is in interesting contrast with that taken by California under its new securities law:

[D]enial of the tender offer in California may be ineffective to deny the transaction unless there are a substantial number of security holders in California. The Commissioner will take into account that the effect of denial of such tender offer may result in forcing the California security holders into a minority position with respect to a subsidiary corporation of the tenderor. Therefore the Commissioner may waive full compliance in a particular case with all of the standards of fairness in the Rules to permit California security holders the opportunity to exchange their securities on the same basis as non-resident security holders. H. MARSH & R. VOLK, PRACTICE UNDER THE CALIFORNIA SECURITIES LAW OF 1968 at 295 (1969).

¹⁴⁴ CODE § 1707.041(C) (Page Supp. 1969).

tion for all equity securities taken up.¹⁴⁵ The statute contains no withdrawal provisions comparable to those in the Williams Act.¹⁴⁶

VI. ADMINISTRATIVE POWERS

In addition to other powers given to the Division, the Act provides that, pursuant to sections 119.01 to 119.13¹⁴⁷ of the *Code* (the Administrative Procedure Act), the Division may prescribe "reasonable" rules and regulations, such as:

- (1) Defining fraudulent, evasive, deceptive, or grossly unfair practices in connection with take-over bids, and the terms used in this section;
- (2) Exempting from this section, take-over bids not made for the purpose of, and not having the effect of, changing or influencing the control of a target company;
- (3) Covering such other matters as have been necessary to give effect to this section.¹⁴⁸

Categories 2 and 3 are reasonably unexceptionable. However, the first provision may through inadvertance or otherwise invite an exercise in futility for, while the Division may define "fraudulent, evasive, deceptive, or grossly unfair practices" in connection with takeover bids, it is not clear that the statute makes any such practice unlawful or gives the Division enforcement powers if it defines such practices and thereafter makes a determination that someone has been guilty of them.¹⁴⁹ It is difficult to believe that such an omission was deliberate; hence, it appears that it should join other instances in which incongruities, inconsistencies and gaps appear in the legislation.

One of the grave shortcomings of this legislation, particularly as contrasted with the Williams Act, is its failure to regulate in any fashion whatsoever the conduct of the target company prior to and during the tender offer. Under the Williams Act "[a]ny solicitation or recommendation to the holders of such a security [one which is the subject of a tender offer] to accept or reject the tender offer . . . shall be made in accordance with such rules and

¹⁴⁵ *Id.*

¹⁴⁶ Exchange Act § 14(d)(5), 15 U.S.C. § 78n(d)(5) (Supp. IV, 1969).

¹⁴⁷ CODE § 119.01-.13 (Page 1969).

¹⁴⁸ *Id.* § 1707.041 (F) (Page Supp. 1969). It should be noted that item (2) is based on Exchange Act § 14(d)(8)(D), 15 U.S.C. § 78n(d)(8)(D) (Supp. IV, 1969).

¹⁴⁹ CODE § 1707.19 (Page 1964) might be construed to permit suspension and revocation of a dealer's license if he violated such a determination by the Division since it provides for such a remedy if a dealer "has intentionally violated any provision of sections 1707.01 to 1707.45, inclusive, of the Revised Code, or any regulation or order made thereunder . . ." *Id.* § 1707.19(D).

regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.¹⁵⁰ Pursuant to this the SEC has required the filing of Schedule 14D by anyone who makes a recommendation with regard to a tender offer.¹⁵¹ In addition, under section 14(e) of the Williams Act:

[It is unlawful for anyone to] make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request or invitation.¹⁵²

It is evident that section 14(e) is intended to govern the conduct not only of offerors but of target companies as well.

Unlike the Williams Act, the Act contains no suggestion that the Division might by rule regulate the conduct of the target company. As noted,¹⁵³ it may *define* certain undesirable conduct — presumably including conduct of the target company — but there is no provision for any sanctions if the rules are violated; it may exempt takeover bids not intended to affect control; and it may make rules “covering such other matters as are necessary to give effect to this section.”¹⁵⁴ In view of the express purpose of the legislation (“protecting shareholders . . . by requiring public announcement and fair, full, and effective disclosure to such shareholders prior to the making of take-over bids”)¹⁵⁵ and the express imposition of burdens only on the offeror, it is doubtful if the Division would consider rules governing the target company as “necessary to give effect to this section.”

There is in the Act no requirement for advance filing and clearance of any communications proposed to be made to its shareholders by a target company and there is not even a prohibition against the use of fraudulent means in opposing a tender offer. Thus, from 20 days prior to the proposed commencement of the tender offer the target company will be fully apprised of the intentions of the offeror (the period may be much longer as a con-

¹⁵⁰ Exchange Act § 14(d)(4), 15 U.S.C. § 78n(d)(4) (Supp. IV, 1969).

¹⁵¹ SEC Rule 14d-4, 17 C.F.R. § 240.14d-4 (1970), *reprinted in* 2 CCH FED. SEC. L. REP. ¶ 26,887, at 20,152.

¹⁵² Exchange Act § 14(e), 15 U.S.C. § 78n(e) (Supp. IV, 1969).

¹⁵³ See text accompanying note 148 *supra*.

¹⁵⁴ CODE § 1707.041(F)(3) (Page Supp. 1969).

¹⁵⁵ Amend. Sub. S.B. No. 138, File No. 90 (Reg. Sess. 1969-70).

sequence of subsection 1707.041(B)(4)¹⁵⁶ and will be possessed of extensive information concerning it and its proposed offer. From then on it can range as freely as it wishes and use whatever means it wishes to oppose the offer, while the offeror is subject to the multiple restraints discussed above. In this particular the legislation reaches its zenith in protecting incumbent management.

VII. REMEDIES

Section (E) provides that "an offeror is subject to the liability and penalties applicable to a seller and an offeree is entitled to the remedies applicable to a purchaser, as set forth in sections 1707.041 [a mistake in the official version of the statute: it was intended to read section 1707.41] to 1707.44, inclusive, of the Revised Code."¹⁵⁷ In this connection it should be noted that with the exception of this effort to read the general liability and penalty sections of the Ohio Securities Law into the Act, there are no sections creating liabilities or penalties for violation of the tender offer law. Thus, if this technique is not effective, there are no liabilities or penalties; the only other penalty section in the Securities Law, section 1707.99¹⁵⁸ which creates criminal penalties, makes it a crime to commit any of the acts described in section 1707.44 and hence is effective only if the grafting effort is accomplished.

Section 1707.41 sets forth the civil liability of a "seller" for fraud;¹⁵⁹ section 1707.42 sets forth the civil liability for someone who acts as an advisor with regard to a sale of a security;¹⁶⁰ section 1707.43 describes the remedies of a purchaser in an unlawful sale;¹⁶¹ and section 1707.44 describes conduct which may constitute a violation.¹⁶² No attempt will be made to parse in detail the difficulties of effectuating the deceptively simple effort to transpose "offeror" for "seller" and "offeree" for "purchaser." However, it should be noted there is more involved in these sections than simply these terms; there is conduct described which if engaged in

¹⁵⁶ CODE § 1707.041(B)(4) (Page Supp. 1969) prescribes a 60-day period for adjudication by the Division and that the adjudication shall be subject to judicial review under the Administrative Procedure Act [*id.* §§ 119.01-.13 (Page 1969)].

¹⁵⁷ *Id.* § 1707.041(E) (Page Supp. 1969).

¹⁵⁸ *Id.* § 1707.99 (Page 1964).

¹⁵⁹ *Id.* § 1707.41.

¹⁶⁰ *Id.* § 1707.42.

¹⁶¹ *Id.* § 1707.43.

¹⁶² *Id.* § 1707.44.

constitutes a basis for liability or penalty and this conduct is described in terms of *sales* of securities, and it is at least highly questionable whether the verbal transpositions set forth in the statute have the effect by implication of turning upside down the conduct described and reading words as if they applied to tender offers. For instance, section 1707.42 provides:

Whoever, with intent to secure financial gain to himself, advises and procures any person to purchase any security, and receives any commission or reward for such advice or services without disclosing to the purchaser the fact of his agency or his interest in such sales, shall be liable to such purchaser for the amount of such purchaser's damages thereby, upon tender of such security to and suit brought against, such adviser, by such purchaser.¹⁶³

Can this really be read as applying to cash tender offers, so that anyone who advises an offeree to accept a tender offer without disclosing his interest may be subject to a claim? Does it apply to someone who advises *against* acceptance? Further, section 1707.43 provides:

The person making such sale or contract for sale, and every person who has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to such purchaser, in an action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by the purchaser"¹⁶⁴

Again, does the entire sentence turned upside down and around and about become applicable to tender offers?

The Legislative Service Commission commented on this procedure:

Under Ohio law, a criminal law is unconstitutional unless it states a positive prohibition or duty. It is questionable, at best, whether the prohibitions and duties in the bill can be made to mesh exactly with the liabilities and penalties in the existing law, since the bill deals with subject matter not contemplated when the original securities laws were passed. The same difficulty renders existing remedies of doubtful applicability.¹⁶⁵

VIII. SPECIAL PROVISIONS

The Act contains special provisions with regard to regulated industries. Consistent with the approach otherwise taken in the

¹⁶³ *Id.* § 1707.42.

¹⁶⁴ *Id.* § 1707.43.

¹⁶⁵ Legislative Service Commission, *supra* note 24.

Ohio Securities Law,¹⁶⁶ the Superintendent of Insurance is substituted for the Division if either the offeror or the target company is an insurance company.¹⁶⁷ The Act is made specifically inapplicable when the offeror or the target company is a public utility or a public utility holding company as defined in the federal Public Utility Holding Company Act of 1935,¹⁶⁸ is a bank or a bank holding company subject to the Bank Holding Company Act of 1956,¹⁶⁹ or is a savings and loan holding company as defined in the Savings and Loan Holding Company Amendments of 1967.¹⁷⁰ In any of the above events the bid is subject to approval by the appropriate federal agency, or if the offeror and the target company are banks and the offer is part of a merger transaction, subject to approval by appropriate federal supervisory authorities.¹⁷¹

IX. CONCLUSION

This discussion has not dealt with broad policy questions: are tender offers good or bad for the American economy, or perhaps more specifically, for the Ohio economy? To what extent should regulation of tender offers go beyond simply seeking to preserve a reasonable balance between the interests of shareholders, management and would-be offerors? To what extent should such legislation go beyond merely requiring disclosure? Rather, the discussion has been confined largely to considering the particular legislation incorporated in section 1707.041. Careful analysis of this Act would suggest that it is "special interest" legislation sailing under different colors, weighted obviously to protect incumbent management from attack. This is accomplished largely under the fiction of requiring fair disclosure to shareholders. The disclosure method, however, is of such a nature, and the procedures are so designed that they accomplish a substantive result not encompassed in the expressed purpose of the legislation — the discouragement, nay, the prohibition in effect, of tender offers. Disclosure is not the real aim. The real aim is the protection of incumbent management from intruders. The legislation places in the Division vast discretion, the exercise of which may easily result, not in placing

¹⁶⁶ CODE § 1707.32 (Page 1964).

¹⁶⁷ *Id.* § 1707.041(C) (Page Supp. 1969).

¹⁶⁸ 15 U.S.C. § 79 (1964).

¹⁶⁹ 12 U.S.C. § 1841 (1964).

¹⁷⁰ 12 U.S.C. § 1730a (1969).

¹⁷¹ CODE § 1707.041(H) (Page Supp. 1969).

information in the hands of shareholders, but in denying them the opportunity to avail themselves of attractive opportunities.

At the moment tender offers are less frequent than they were and hence the yearning of management for protection is less intense. It is not unlikely, however, that when they again become favored instruments for accomplishing changes of control, Ohio's legislation will become the model for other states. Such a multiplication of legislation with the shortcomings of this legislation could only be unfortunate.

For all of its shortcomings, it has been stated that the Ohio Act is "more sophisticated than Federal laws covering the same grounds."¹⁷²

So be it.

¹⁷² Vorys, *supra* note 11, at 65.