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## CORPORATE TAKE-OVER BIDS: GAP IN FEDERAL SECURITIES REGULATION †

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### INTRODUCTION

**T**HE Securities Acts Amendments of 1964,<sup>1</sup> described as "the most significant statutory advance in Federal Securities regulation since 1940,"<sup>2</sup> extended to investors in the larger unlisted companies the same protection formerly afforded only to investors whose securities were listed on an exchange. Furthermore, these amendments strengthened the standards of entrance into the securities business and expanded disciplinary controls over brokers, dealers and other security industry personnel.<sup>3</sup> The enactment of this legislation constituted a major step forward in investor protection: elimination of the disparity between the disclosure requirements of the exchanges and the over-the-

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† This article is based on an address delivered at the Securities Laws and Regulations Institute held on January 20-21, 1967 in Miami, Florida.

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<sup>1</sup> 78 Stat. 565 (1964), 15 U.S.C. § 313 (1964).

<sup>2</sup> SEC, 31st ANNUAL REPORT 1 (1965); SEC News Digest No. 64-9-9 (Sept. 14, 1964).

<sup>3</sup> See S. Rep. No. 379, 88th Cong., 1st Sess. 1, 2 (1964); H.R. Rep. No. 1418, 88th Cong., 2d Sess. 1, 2 (1964).

counter markets. But an important area of securities regulation—protection of investors in connection with corporate take-over bids—remains untouched and neglected. It is an area in which a double standard of disclosure still exists and one in which public investors are asked to sell in darkness. The main objectives of this article are to examine the current situation with respect to corporate take-over bids, to bring into sharp focus what the writers believe to be a serious gap in securities regulation, and to underscore the immediate need for adequate legislation: legislation which would protect the investing public without excessively obstructing potential bids for control.

#### NATURE OF THE TAKE-OVER BID AND REASONS FOR ITS ASCENDANCY

In recent years there has been a marked increase in the use of cash tender offers—take-over bids—by persons whose objective is to acquire control of public companies.<sup>4</sup> Of course, the tender offer is a device that has been used for a variety of other corporate purposes,<sup>5</sup> but this article is confined to a discussion of its use as related to take-over bids. Reasons for the popularity enjoyed by the take-over

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<sup>4</sup> See Merjos, *No Tender Trap*, *Barron's Nat'l Bus. & Financial Weekly*, Jan. 25, 1965, p. 5; *Buying Into a Company Via the Tender Offer*, *Bus. Week*, Feb. 26, 1966, p. 38; *Cash Is Eclipsing Proxy Wars*, *N. Y. Times*, Jan. 17, 1966, p. 110, col. 3; Cohen, Address to the American Society of Corporate Secretaries, Inc., June 28, 1966; Comment, *The Regulation of Corporate Tender Offers Under Federal Securities Law: A New Challenge for Rule 10b-5*, 33 U. CHI. L. REV. 359 (1966). Of course, the cash tender offer may be used for purposes other than acquisition of control. *Infra* note 5.

<sup>5</sup> Perhaps the most common use of the tender offer occurs when a corporation seeks to acquire its own securities. See *More Companies Are Buying Back Their Stock*, *Harv. Bus. Rev.*, March-April 1965, pp. 40, 53; *Investing In Yourself*, *Wall Street Journal*, June 30, 1965, p. 1, col. 6; *The Case for Retiring Stock*, *Fortune*, Nov. 1965, p. 245; Fleck, *Corporate Share Repurchasing: An Informal Discussion*, *HARV. BUS. S. BULL.*, Jan.-Feb. 1965, p. 10; Zilber, *Corporate Tender Offers for Their Own Stock: Some Legal and Financial Considerations*, 33 U. CINC. L. REV. 315 (1964). Other uses of the tender offer include: purchase of outstanding shares of minority shareholders; reduction of capitalization; increasing treasury stock for future acquisitions or for options; thinning out of stockholder lists; elimination of a class of stock; obtaining of shares to meet sinking fund requirements; to settle a shareholder's derivative action. See Merjos, *supra* note 4.

bid are fourfold: secrecy, speed, simplicity and savings. As SEC Chairman Cohen has observed: "It is certainly simpler, and perhaps less costly, than a proxy fight for control. . . . In many cases of cash tender offers . . . the public investor does not even know the identity of the purchaser, much less what the purchaser plans to do with the company if the take-over bid is successful."<sup>6</sup> In short, if a *cash* tender offer is used, the bidding company or group may simply insert an advertisement in a newspaper asking shareholders to tender their shares at a certain price. No filing with any regulatory agency is necessary. Moreover, such material facts as the present security holdings, market activity, and even the name and background of the person making the take-over bid, need not be disclosed. This is in sharp contrast with the situation involving an exchange offer. When Corporation *A* makes an offer to the individual shareholders of Corporation *B* to exchange *A* shares for their *B* shares, unless some exemption is available, the exchange offer is subject to the registration requirements of the Securities Act of 1933.<sup>7</sup> Registration, of course, means full and fair disclosure. Broadly speaking, this disclosure objective is accomplished by requiring the offering corporation to file a registration statement with the Securities and Exchange Commission containing financial and other pertinent material. This requirement is the heart of the "truth in securities" law. The registration statement must be filed *prior* to the offering. Furthermore, a prospectus, containing that portion of the information in the registration statement considered necessary to enable an investor to evaluate the securities and to make an informed judgment whether or not to make the exchange, must be made available to all offerees. From the standpoint of protection of investors, the cash tender offer, as a device for acquiring control, is also sharply distinguishable from a proxy contest. Proxy contests are subject to the advance

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<sup>6</sup> Cohen, *supra* note 4.

<sup>7</sup> 48 Stat. 74 (1933), as amended, 68 Stat. 683 (1954), 15 U.S.C. § 77b (1964). On the possible availability of exemptions, see SOWARDS, *THE FEDERAL SECURITIES ACT* §§ 2.03(1), 4.02 (1965).

filing, examination and full and fair disclosure provisions of the Securities Exchange Act of 1934.<sup>8</sup> Finally, exchange offers and proxy contests are subject to the civil and criminal liability provisions of the 1933 and 1934 Acts respectively. No such express sanctions exist with respect to cash tender offers.

The mechanics of the take-over bid are simple. Typically, *X*, the person seeking to acquire control, or *X*'s agent, will make an offer by newspaper advertisement to purchase for cash a certain number of shares of *Y* Corporation at a fixed price that is set above the current market price. *Y* Corporation shareholders are invited to tender their shares for purchase by *X* or *X*'s agent. More specifically, *Y* Corporation shareholders who wish to accept the offer are instructed (1) to send a "letter of transmittal," accompanied by their stock certificates in transferable form, to *X* or *X*'s agent, or (2) to request their bank or broker to effect the tender transaction for them. A date and hour for termination of the purchase offer are stated.

The "letter of transmittal," and "letter of offer" obtainable from *X* or *X*'s agent, may make the offer a conditional one. A common condition makes the purchase offer operative only in the event that a minimum number of shares are tendered prior to the expiration date.<sup>9</sup> Until that time the shareholder who has tendered his shares may not trade them.<sup>10</sup> Collateral problems may be raised in this

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<sup>8</sup> Securities Exchange Act of 1934, § 14(a), as amended, 78 Stat. 569 (1964), 15 U.S.C. § 78n(a) (1964). For a discussion of current proxy regulation, see Sowards and Moisky, *Federal Proxy Regulation: Recent Extension of Controls*, 41 ST. JOHN'S L. REV. 165 (1966).

<sup>9</sup> Thus, in a recent tender offer for 350,000 shares of Columbia Pictures Corp., the offer was conditioned as follows: "All shares up to 350,000 shares tendered before the offer expires will be purchased provided at least 200,000 shares are tendered. If less than 200,000 shares are tendered, none or all or a portion of the excess shares may be purchased. Tenders of all or a portion of such excess shares may be assigned to others. If less than all shares tendered up to October 14, 1966 are purchased, they will be purchased on a pro rata basis." Wall Street Journal, Oct. 3, 1966, p. 32, col. 2.

<sup>10</sup> In an advertisement replying to the Columbia Pictures offer, *supra* note 9, management advised shareholders as follows: "Remember, a tender by you is irrevocable. Once you tender your stock, you cannot withdraw it or sell it or borrow on it. You will be giving the Swiss bank a free option to buy your stock for \$33.00 a share until at least October 14, 1966, and possibly beyond that date." Wall Street Journal, Oct. 7, 1966, p. 24, col. 5.

area. Are all shareholders given an equal opportunity to accept the offer? If the offer is to purchase a specified number of shares, must tenders be accepted on a pro rata basis in the event that shareholders tender more than that number? With respect to companies whose securities are listed on the New York Stock Exchange, "the offer should provide that tenders will be accepted on a pro rata basis if more shares are tendered than are to be purchased. . . . After a minimum period of 10 days for the acceptance of shares on a pro rata basis, there is no objection to receiving shares thereafter on a 'first-come first-served' basis."<sup>11</sup> This policy stems from the practical premise that all shareholders should be given an equal opportunity to participate in tender offers.<sup>12</sup> But if the offer specifies no reasonable minimum period of acceptance, shareholders residing at a distance may be deprived of an ample opportunity to learn of the tender offer and to tender their shares.<sup>13</sup> Similar considerations apply to companies whose securities are listed on the American Stock Exchange,<sup>14</sup> but the other eleven organized American stock exchanges and the National Asso-

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<sup>11</sup> N.Y. STOCK EXCHANGE MANUAL A-180 (1963).

<sup>12</sup> N.Y. STOCK EXCHANGE MANUAL A-179 (1963).

<sup>13</sup> If the minimum 10-day period is used, "notices should be sent by air mail to distant stockholders and provision made for telegraphic acceptance through a member firm or bank, similar to a rights offering." N.Y. STOCK EXCHANGE MANUAL A-180 (1963). The same policy has been followed with respect to limiting a tender offer to shareholders of record on a certain date, for the reason that shareholders who had collateralized their shares or into whose names the shares had not been transferred would not be holders on the record date and thus might be deprived of their right to participate in the tender offer. *Ibid.* On tender offer commission charges involving use of the facilities of an exchange member organization, see N.Y. STOCK EXCHANGE M.F. EDUC. CIRCULAR No. 161, June 15, 1962.

<sup>14</sup> Although the American Stock Exchange has no formal rule governing the making of tender offers, the Exchange "recommends that, where a tender offer is limited to a certain number of shares, invitations to tender be given to all stockholders on a pro rata basis and not on a first-come first-served basis. Furthermore, this Exchange objects to an offer being made to holders of a security listed on this Exchange when it is limited to holders of record only. Rather, the offer should be made to all beneficial holders of the security, whether or not they are record holders." Letter from A. R. Steffens (American Stock Exchange) to the writers, Oct. 4, 1966.

ciation of Securities Dealers, Inc. have no rules regulating the form of tender offers.<sup>15</sup>

THE INADEQUACY OF CURRENT REGULATION OF  
CORPORATE TAKE-OVER BIDS

Existing legislation inadequately deals with corporate take-over bids via the cash tender offer. First of all, there is no federal statute, rule or regulation *expressly* regulating cash tender offers.<sup>16</sup> Second, the applicability by implication of existing statutes, rules or regulations to cash tender offers is doubtful. Section 10(b) of the Securities Exchange Act of 1934<sup>17</sup> and the controversial rule 10b-5<sup>18</sup> are

<sup>15</sup> The limited amount of state regulation of the form of tender offers has been restricted to purchase by a corporation of its own shares. See, e.g., N.C. GEN. STAT. § 55-52(c)(1) (providing for purchase "pro rata from all its shareholders or all of a class of shareholders").

<sup>16</sup> See notes 11-15 *supra* for regulations governing the *form* of tender offers.

Section 5(c) of the Securities Act of 1933 does make it unlawful to "offer to buy . . . unless a registration has been filed as to such security . . ." 48 Stat. 77 (1933), 15 U.S.C. § 77e(c) (1964). However, it is clear that the term "offer to buy" was included originally in section 5 expressly for the purpose of preventing professional securities dealers from offering to buy from underwriters prior to the effective date. The 1954 amendments merely effected a change in this dealer-underwriter prohibition so as to preclude such offers prior to the filing date. See S. Rep. No. 1036, 83d Cong., 2d Sess. 14-15 (1954); H.R. Rep. No. 85, 83d Cong., 2d Sess. 24 (1954); SOWARDS, THE FEDERAL SECURITIES ACT § 7.04(2) (1965).

<sup>17</sup> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 48 Stat. 891 (1934), 15 U.S.C. § 78j(b) (1964).

<sup>18</sup> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (1964).

foremost candidates. It has been suggested, however, that section 10 and rule 10b-5 may not be applicable to many cash tender offers. Reason: the section and the rule are not activated unless there is a duty to disclose. Further, no duty to disclose arises unless there exists a fiduciary or special relationship between the parties to the transaction of purchase and sale.<sup>19</sup> One may quarrel with this conclusion on the ground that both the section and the rule apply to "any person," but what few judicial and administrative pronouncements there are apparently reject such a literal application.<sup>20</sup> In the celebrated *Cady, Roberts* case, for example, Professor Cary, then SEC Chairman, while noting that "the anti-fraud provisions are phrased in terms of 'any person,'" added that "a special obligation has been traditionally required of corporate insiders, e.g., officers, directors and controlling stockholders."<sup>21</sup>

Aside from purely legal considerations, there may be practical reasons for a reluctance to extend the rule beyond insiders or those persons who receive inside information directly from them and act upon it.<sup>22</sup> In short, there is

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<sup>19</sup> See Painter, *Inside Information: Growing Pains for the Development of Federal Corporation Law Under Rule 10b-5*, 65 COLUM. L. REV. 1361, 1383-84 (1965). See also Comment, *The Regulation of Corporate Tender Offers Under Federal Securities Law: A New Challenge for Rule 10b-5*, 33 U. CHI. L. REV. 359, 373 (1966).

<sup>20</sup> In *Connelly v. Balkwill*, 174 F. Supp. 49, 59 (N.D. Ohio 1959), *aff'd per curiam*, 279 F.2d 685 (6th Cir. 1960), the district court observed: "Certainly the more reasonable view would seem to be that the duty to speak which is implicit in Rule X 10b-5 arises in those circumstances where a fiduciary or quasi fiduciary relation exists. . . . But it cannot be supposed that the rule imposes a duty to speak in all cases involving the purchase or sale of securities irrespective of the relations of the parties or the circumstances under which the transaction is consummated." See also *Mills v. Sarjem Corp.*, 133 F. Supp. 753, 764 (D.N.J. 1955).

<sup>21</sup> *Cady, Roberts & Co.*, 40 S.E.C. 907, 912 (1961). Professor Cary also observed, however, that officers, directors and controlling shareholders "do not exhaust the classes of persons upon whom there is such an obligation," and added:

Analytically, the obligation rests on two principal elements; first, the existence of a relationship, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing.

<sup>22</sup> See *Where The Texas Gulf Kuling Could Lead*, Bus. Week, Aug. 27, 1966, p. 38; *Inside The "Insider" Issue*, Fortune, July 1965, p. 69; Adams,



strong argument to the effect that the applicability of the section and the rule should be confined to cases involving a fiduciary or special relationship between the parties.<sup>23</sup>

Applying the above argument and its principles to corporate take-over bids, suppose that Group X, an inside group, represents in its offer to purchase that Y, an outside group, is the bidder. Or suppose that the letter of offer states that the inside bidding group seeks to acquire control for the purpose of ousting an incompetent management when in reality the sole objective of acquisition is to liquidate. These are clear cases of special relationship and of active misrepresentation of material facts which may influence the shareholder in his decision to sell. Section 10(b) and rule 10b-5 are applicable.<sup>24</sup>

Suppose, however, that no fiduciary or special relationship exists. The bidding group is truly an outside group, having a nominal interest at most in the corporation sought to be acquired. The deal is an arm's-length one in every respect. Suppose further that there is complete lack of disclosure, or even active misrepresentation, of material facts, *e.g.*, the bidding group deliberately conceals its identity or misrepresents it. Fraud there is. More than that: within the language of rule 10b-5, there is "fraud or deceit . . . in connection with the purchase or sale of any security." But, unless the rule is extended to include "any person," it is not applicable. As previously indicated, such a literal extension is highly improbable.<sup>25</sup>

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*Cashing In on an Inside Tip*, The New Republic, July 30, 1966, p. 14; Painter, *supra* note 19, at 1389-90; Ruder, *Pitfalls in the Development of a Federal Law of Corporations by Implication Through Rule 10b-5*, 59 Nw. U.L. REV. 185, 194 (1964).

<sup>23</sup> At the state level the same argument is appropriate. Section 101 of the UNIFORM SECURITIES ACT is modeled on rule 10b-5, and it covers both the purchase and sale of securities. Several non-UNIFORM ACT states have recently adopted fraud provisions similar to rule 10b-5. See, *e.g.*, FLA. STAT. ANN. § 517.301 (Supp. 1965).

<sup>24</sup> Similar considerations should apply when the bidding group makes unfair use of inside information obtained from insiders of the corporation sought to be acquired, for it is submitted that such activity creates a special relationship between the bidding group and the offeree-shareholder. See note 21 *supra*; Comment, *The Regulation of Corporate Tender Offers Under Federal Securities Law: A New Challenge for Rule 10b-5*, 33 U. CHI. L. REV. 359, 374 (1966).

<sup>25</sup> See text in connection with notes 19-22 *supra*.

## THE NEED FOR EXPRESS LEGISLATION ON TAKE-OVER BIDS

Proceeding from the dubious assumption that existing statutes, rules or regulations are applicable, by implication, to cash tender offers, these statutes, rules and regulations constitute at best stop-gap methods of dealing with the problem. The most that can be hoped for is to cure the injury after it has occurred. But a basic philosophy of the federal securities laws is that of full and fair disclosure. More particularly, there must be made available to the investor those facts necessary to make an informed judgment *before* he makes his investment decision. The plain fact of the matter is that, with respect to corporate take-over bids, *express* legislation is needed to accomplish this objective.<sup>26</sup>

There is no sound reason for asking an investor to *buy* in daylight and *sell* in darkness. In both situations he should be entitled to the opportunity of making an evaluation of the offer based upon advance material information. With respect to take-over bids, a minimal amount of such

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<sup>26</sup> The point has been made by one commentator that the SEC exercises regulatory authority over proxy statements pursuant to a grant of power in section 14 "identical" to that granted in section 10(b), and therefore that the SEC might regulate in advance the contents of a tender offer. Comment, *The Regulation of Corporate Tender Offers Under Federal Securities Law: A New Challenge for Rule 10b-5*, 33 U. CHI. L. REV. 359, 385 n.108 (1966). However, this comment apparently overlooks the fact that section 14 *expressly* makes it unlawful for any person, contrary to Commission rules, "to solicit or to permit the use of his name to solicit any proxy . . ." while such an express prohibition is lacking in section 10(b). The same commentator makes the point that the Commission might require, by regulation under the present section 10(b), a registration statement in connection with tender offers, but concludes that express requirements for registration statements in the 1933 Act and in other federal securities laws "would appear to negate any congressional intent that the SEC exercise this power." *Id.* at 384. Along these same lines, SEC Chairman Cohen has remarked: "We have several rules which already apply in this area, and I believe that we have additional rule-making power, which has not yet been exercised, under the existing statutes. . . . While it is probable that we can adopt rules regulating take-over bids without legislation, it may be desirable to make this power entirely clear." Cohen, Address to the American Society of Corporate Secretaries, Inc., June 28, 1966. Presumably, Chairman Cohen also had in mind the following rules under the 1934 Act, especially with respect to tender offers by a company for its own securities: 10b-2, 17 C.F.R. § 240.10b-2 (1964) (solicitation of purchases on an exchange); 10b-6, 17 C.F.R. § 240.10b-6 (1964) (prohibition against trading by persons interested in a distribution); 10b-7, 17 C.F.R. § 240.10b-7 (1964) (stabilization).

information should include the identity, background and security holdings of the bidding group and what that group plans to do with the acquired company. The primary appeal to bidders of the cash tender offer as a means of acquisition lies in its secrecy. But adequate disclosure legislation would focus the spotlight of publicity upon these offers and exert a needed and wholesome influence upon the standards of business conduct. However, granting that such legislation is necessary for investor protection, a problem of economic concern remains: the extent of control of cash tender offers. After all, the bidders are not offering any commodity except cash. The objective of legislation in this important area should be a balancing of interests of bidders and management to the effect that investor protection will not suffer either from unduly hamstringing bidders or excessively shielding entrenched management.

#### THE PROPOSED LEGISLATION

Bills regulating cash tender offers were introduced in the 89th Congress and referred to committees, but this legislation was not voted upon by either the Senate or the House of Representatives before adjournment of the 89th Congress.<sup>27</sup>

As introduced, the bills are identical and if enacted, would become amendments to Section 10(b) of the Securities Exchange Act of 1934.

The proposed legislation requires the disclosure of certain information by persons who make cash tender offers

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<sup>27</sup> S. 2731, H.R. 14417, 89th Cong., 2d Sess. (1966). The Senate bill was referred to the Subcommittee on Securities of the Banking and Currency Committee, and the House bill was referred to the Committee on Interstate and Foreign Commerce; neither committee has prepared a report on the proposed legislation as of this date, and neither committee voted on the legislation before the end of the 89th Congress. Senator Harrison A. Williams, of New Jersey, who introduced the bill in the Senate, has indicated that he will probably reintroduce it in the 90th Congress; Representative Harley O. Staggers, of West Virginia, who introduced the bill in the House of Representatives, has indicated that he will introduce it again in the 90th Congress if he should be requested to do so by the Securities and Exchange Commission.

for certain securities.<sup>28</sup> Under the bills, the persons required to make this disclosure are those offerors holding, or intending to purchase, beneficial ownership<sup>29</sup> of more than five per cent of any class<sup>30</sup> of equity security<sup>31</sup> registered pursuant to Section 12 of the Securities Exchange Act of 1934.<sup>32</sup> Those securities which are registered pursuant to section 12 and to which the disclosure requirements of the proposed legislation would be applicable are securities which are listed and registered on national securities exchanges and over-the-counter securities of corporations (1) doing business in interstate commerce or whose securities are traded by use of the mails, (2) having total assets in excess of \$1,000,000 and (3) having a class of equity securities held of record by 500 or more persons.<sup>33</sup>

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<sup>28</sup> The disclosure requirements of the bills are applicable only to cash tender offers made by use of the mails or any means or instrumentalities of interstate commerce.

<sup>29</sup> Although no definition of beneficial ownership is provided in the proposed legislation, presumably the same principles would apply in determining beneficial ownership in the proposed legislation as have been applied in determining beneficial ownership for reporting purposes under Section 16(a) of the Exchange Act, in registration statements, in annual reports, in proxy statements and in applications for registration as broker-dealers or investment advisers. For a discussion of the meaning of "beneficial ownership," see SEC Securities Exchange Act Release Nos. 7824, Feb. 14, 1966; 7793, Jan. 19, 1966.

<sup>30</sup> The term "class" has been defined to mean securities which are substantially similar in character and the holders of which partake of substantially similar rights. Securities Exchange Act of 1934, § 12(g) (5), 48 Stat. 892, as amended, 78 Stat. 565 (1964), 15 U.S.C. § 78l(g) (5) (1964).

<sup>31</sup> The term "equity security" has been defined to include "any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right. . . ." Securities Exchange Act of 1934, § 3(a) (11), 48 Stat. 882 (1934), 15 U.S.C. § 78c(11) (1964).

<sup>32</sup> In determining whether a person is the beneficial owner of more than five per cent of a class of any security, a class is defined to consist of shares of such class which are outstanding, not including shares of such class which are held for the account of the issuer. The choice of five per cent, of course, is an arbitrary one, and this figure may or may not amount to control. Rule 405 of the 1933 Act defines "control" in terms of "possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." See also Sommer, *Who's "In Control"?*—S.E.C., 21 Bus. Law. 559 (1966).

<sup>33</sup> For a discussion of the criteria necessitating registration of securities under Section 12 of the Exchange Act, see Sowards and Mofsky, *Federal Proxy Regulation: Recent Extension of Controls*, 41 ST. JOHN'S L. REV. 165, 171-79 (1966).

Offerors who come within the purview of the bills may not make cash tender offers until twenty days after such offerors have sent a prescribed notice to the issuer<sup>34</sup> of the securities involved and filed a statement with the Commission. These notices and statements must disclose the following information:

- (1) the names and backgrounds of the persons making the tender offer and if the tender offer is being made by an agent for a principal, the names and backgrounds of all principals;
- (2) the source of the funds to be used in the purchases, and if the funds are borrowed, the names of the lenders and a description of the loan transaction;
- (3) the offerors' reasons for making the tender offer and if the reason is to acquire control of the business or representation on the board of directors, the plans of the offerors for the future business of the corporation being acquired;
- (4) the number of shares of the security being acquired which are already beneficially owned by the offeror and his associates, and the dates of purchase of such securities, prices paid, short sales effected, names of broker-dealers through whom such purchases or short sales were effected and prices of each purchase or short sale;
- (5) information as to any contracts or arrangements with respect to the securities already owned or to be acquired, such as loan or option arrangements, transfer arrangements, joint ventures, puts and calls, guarantees against loss or guarantees of profit, division of losses or profits, or giving or withholding of proxies; and
- (6) any additional information which may be prescribed by the Commission in rules or regulations for the protection of investors.<sup>35</sup>

The purpose of requiring disclosure of the above information is to provide the security holder with material facts necessary for him to reach an informed decision as to whether or not he should tender his shares. SEC Chairman Cohen has pointed out that the argument has been

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<sup>34</sup> The notice must be sent, by registered mail, to the principal executive office of the issuer of the securities.

<sup>35</sup> Any material changes which occur in the facts which are set forth in the notice and statement must be promptly transmitted to the issuer and filed with the Commission.

advanced by some persons that the "basic factor which influences shareholders to accept a tender offer is the adequacy of the price."<sup>36</sup> However, it is questionable whether the average investor can determine the adequacy of price without knowing the identity of the offeror and the offeror's plans for the future business conduct of the corporation. For example, an offeror may have plans to liquidate a corporation for a per share amount which is greater than the price offered for the shares. If so, shareholders who are apprised of the liquidation plans may decide to wait for their per share liquidation value rather than tender their shares for the offered price. At least such informed shareholders would have the opportunity to make knowledgeable decisions. Furthermore, as Chairman Cohen suggests, it may be unimportant whether or not the liquidation value of the corporation is generally known, because the success of a liquidation may depend on the ability and dependability of the persons undertaking the liquidation. Therefore, investors may base their decisions on whether or not to tender their shares on the identity of the persons seeking control of the corporation, as well as on the plans for liquidation.<sup>37</sup>

The philosophy of full disclosure, that underlies the proposed legislation and grants an opportunity to investors to make informed decisions in determining whether to tender their shares, is not new to the federal securities laws. As previously stated, the basic principle of the Securities Act of 1933 is its requirement of furnishing to prospective purchasers fair and complete information,<sup>38</sup> and the philosophy underlying Section 14 of the Exchange Act and the Commission's proxy rules is the full and fair disclosure of material facts to permit knowledgeable and intelligent votes by security holders in corporate affairs.<sup>39</sup>

In many respects, the proposed legislation is similar to existing proxy legislation and the Commission's proxy

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<sup>36</sup> Cohen, *supra* note 4.

<sup>37</sup> *Ibid.*

<sup>38</sup> See S. Rep. No. 47, 73d Cong., 1st Sess. 6-7 (1933); H.R. Rep. No. 85, 73d Cong., 1st Sess. 1-2 (1933).

<sup>39</sup> See *SEC v. Transamerica Corp.*, 163 F.2d 511, 518 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948).

rules. Both the proxy rules and the proposed take-over legislation contemplate advance filing of material information with the Commission.<sup>40</sup> Moreover, much of the information required in the proxy statement is similar to the information that would be required in the tender offer statement.<sup>41</sup> The Commission's rules regulating the contents of proxy statements necessitate more detailed information than is required by the tender offer bills.<sup>42</sup> However, the bills authorize the Commission to promulgate rules requiring information necessary for investor protection, and, if the legislation is enacted, the Commission undoubtedly will adopt and refine appropriate rules.

One significant difference between federal proxy regulation and the proposed tender offer legislation is the absence of Commission regulation of recommendations, by management or others, to accept or reject tender offers.<sup>43</sup> The proxy rules require persons soliciting proxies, whether management, insurgents or others, to file the required information statements with the Commission prior to the solicitation of proxies.<sup>44</sup> However, under the proposed tender offer legislation, only those persons inviting tenders would be required to file the necessary information with the Commission before inviting tenders. Accordingly, management or other persons who opposed a take-over bid would not be subject to the full disclosure provisions of this legislation. It is the strong recommendation of the writers that the proposed legislation be modified, when reintroduced, to include Commission regulation of recommendations on acceptance and rejection of tender offers. Such a change would subject all parties in a take-over bid contest to the same standards of full disclosure.

Generally speaking, proxy materials are processed by the Commission through an examination and letter of comment technique similar to that used in processing regis-

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<sup>40</sup> See SEC Securities Exchange Act Release No. 7566, April 8, 1965.

<sup>41</sup> For a list of those items of information which must be included in a proxy statement, see SEC Schedule 14A, Regulation 14A. See also Sowards and Mofsky, *supra* note 33, at 195-210.

<sup>42</sup> *Ibid.*

<sup>43</sup> See Cohen, *supra* note 4.

<sup>44</sup> See SEC Securities Exchange Act Release No. 7566, April 8, 1965.

tration statements under the Securities Act of 1933.<sup>45</sup> Presumably, this type of procedure would be adopted in determining the adequacy of statements filed prior to a tender offer. The Commission stop order procedure,<sup>46</sup> applicable under the Securities Act of 1933, is not authorized with respect to the regulation of proxy solicitation and the proposed regulation of tender offers. It is suggested that the Exchange Act be amended to grant the Commission stop order authority with respect to tender offers as well as proxy solicitation when the material filed in connection with such solicitations or tender offers does not conform to the Commission's specifications. The stop order technique would afford a timely procedure for preventing distribution of false or misleading information.

Another marked difference between the proxy rules and the take-over bid legislation is the manner in which shareholders are informed of the facts which must be disclosed. All persons from whom proxies are solicited must be furnished with the prescribed proxy statement either prior to or at the same time as the solicitation;<sup>47</sup> prescribed annual reports must be distributed to security holders, either before delivery of the proxy statement or with the proxy statement, if the solicitation relates to an annual meeting at which directors are to be elected.<sup>48</sup> Furthermore, as a result of the 1964 amendments to the Securities Exchange Act of 1934, companies which are subject to the Commission's proxy rules, but whose management does not solicit proxies, must distribute information statements to all securities holders. These statements must contain information which is similar to that information required in the proxy statement.<sup>49</sup> However, the proposed legislation regulating take-over bids does not require *delivery* of information concerning such bids to shareholders. Although the information in statements filed under the proposed

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<sup>45</sup> Sowards and Mofsky, *supra* note 33, at 211.

<sup>46</sup> The stop order is an administrative remedy of the Commission used to suspend the effectiveness of the registration statement. Securities Act of 1933, § 8(d), 48 Stat. 79 (1933), 15 U.S.C. § 77h(d) (1958).

<sup>47</sup> See SEC Securities Exchange Act Release No. 7775, Dec. 22, 1965.

<sup>48</sup> See SEC Securities Exchange Act Release No. 7508, Jan. 15, 1965.

<sup>49</sup> See SEC Schedule 14C, Regulation 14C.



legislation would be available to the public, availability does not insure the actual presence of such information in the shareholder's hands at the time the decision is made as to whether the shares should be tendered. The Commission has recommended that "all written tender offers and advertisements concerning them contain such information as the Commission may determine is necessary for the protection of investors."<sup>50</sup> It is submitted by the writers that this recommendation should be included in the bills when they are reintroduced.

The bills, in their present form, require that offerors disclose their intention to make a take-over bid twenty days prior to the tender offer. If a management were opposed to the take-over bid, such a management would have twenty days within which to move against the tender offer even though the offeror could not invite tenders during this period. To equalize this situation, the Commission has recommended that

the offering material be filed with the Commission on a confidential basis five days in advance, and additional offering material at least two days before its use. This would allow [the Commission] an opportunity to examine material to assure compliance with the law, but would not give an opposed management a period in which to mobilize its resources and take action against the offer, at a time when the offeror could not solicit tenders or otherwise make his case.<sup>51</sup>

This advantage which management is afforded under the proposed legislation should be offset by inclusion of the Commission's recommendation in the bills when they are reintroduced, or the bills should be modified to deny management any public utterances with respect to the tender offer during the twenty-day waiting period. Such a placing of management on an equal footing with offerors would be consistent with the proxy rules which require management to set forth in its proxy statements certain

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<sup>50</sup> Cohen, *supra* note 4. See also *Memorandum of the Securities and Exchange Commission to the Committee on Interstate and Foreign Commerce, House of Representatives on H.R. 14417, 89th Congress 17* [hereinafter cited as *Memorandum of SEC*].

<sup>51</sup> *Ibid.*

proposals submitted by security holders within a reasonable time before management's solicitation.<sup>52</sup>

Under the bills, offerors are not required to accept all shares tendered, and if more shares were tendered than were sought by the offerors, shares tendered early in the tender period might be taken and shares tendered late in the tender period might be rejected. This situation could lead to a rush by investors to tender their shares, and such a rush might prevent careful consideration by shareholders of the information which was disclosed. To obviate this discrimination and pressure, the Commission has wisely recommended that the proposed legislation should provide for compulsory acceptance of shares on a pro rata basis.<sup>53</sup> Moreover, assuming that an offeror did not receive the number of shares he sought in a tender offer and thereafter made a second take-over bid at a higher price per share, shareholders who tendered their shares pursuant to the first invitation would receive less than those holders who tendered their shares pursuant to the second offer. The obvious unfairness of such a result should be prevented by revising the bills to require offerors to pay the higher price to all offerees. However, such a revision should distinguish between invitations to tender which are part of the same take-over bid and invitations to tender which are distinct and separate in time and circumstances. This distinction is necessary because an offeror may make a second offer some years after the first invitation and after many changes in the corporation's business affairs; the time lapse and business changes may justify a greater tender price than the price extended in the first offer.

The bills expressly exclude the following tender offers from the disclosure requirements of the new legislation:

- (1) offers made by means of a registration statement under the Securities Act of 1933 or of a proxy statement subject to Section 14 of the Securities Exchange Act of 1934 (however, such offers would be regulated as to disclosure requirements by virtue of the rules adopted under the

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<sup>52</sup> See SEC Securities Exchange Act Release No. 4979, Feb. 6, 1954.

<sup>53</sup> Cohen, *supra* note 4. See also *Memorandum of SEC*, *supra* note 50, at 19.

- (2) 1933 Act<sup>54</sup> and under Section 14 of the Exchange Act<sup>55</sup>); acquisitions which are expressly exempted by rules of the Commission, because such acquisitions would not change or influence the control of the issuer;
- (3) acquisitions which, when added to all acquisitions by the same person of securities of the same class during the preceding twelve month period, would not exceed two per cent of the outstanding securities of that class;<sup>56</sup> and
- (4) acquisitions by corporations of their own outstanding equity securities (treasury shares).

A subsection of the proposed legislation<sup>57</sup> grants the Commission authority to require disclosure of pertinent information by corporations inviting tenders of their own equity securities. However, absent Commission rules, such disclosure is not mandatory, and the bills do not require the Commission to adopt such rules. It would seem that all shareholders should be entitled to the same information and protection regardless of the identity of the offeror. Shareholders who are invited to tender their shares to the issuer of such shares may base their investment decision on management's reason for the acquisition of shares and the plans of management for the conduct of the corporation's business. The bills, when reintroduced, should establish the same standards of disclosure for tender offers made by issuers and non-issuers.

The inapplicability of disclosure requirements to acquisitions that do not exceed two per cent of the outstanding securities of a particular class is intended to permit casual acquisitions that would not change or influence the control of the issuer. Such acquisitions might be made solely for investment purposes or such acquisitions might be made by an issuer of its own stock to provide shares for executive stock options or stock dividends. However, if gradual purchases of two per cent or less of the outstanding shares

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<sup>54</sup> The basic information which must be disclosed in registration statements under the Securities Act of 1933 is set forth in SEC Form S-1.

<sup>55</sup> The information which must be disclosed in proxy statements is set forth in SEC Schedule 14A, Regulation 14A.

<sup>56</sup> As used in the bills, the term "outstanding securities" does not include securities held by or for the account of the issuer.

<sup>57</sup> Subsection (6) of § 10(b), H.R. 14417, 89th Cong., 2d Sess. (1966).

over an extended period of time amount to a pattern of seeking control of the issuer, then the Commission should have the authority to require complete disclosure by the offeror for the protection of the public. Such a pattern of seeking control may be analogized to a piecemeal sale of shares by a controlling person under Section 4(1) and Rule 154 of the 1933 Act.<sup>58</sup> If such a sale of shares has all the attributes of a "bailout pattern," the staff of the Commission has stated that it will consider a "distribution" to be involved.<sup>59</sup> If legislation is enacted the Commission should adopt rules subjecting gradual acquisitions amounting to bids for control to the disclosure requirements.

The disclosure requirements of the bills are applicable to tender offers for more than five per cent of *any* class of *any* equity security which is registered pursuant to Section 12 of the Securities Exchange Act of 1934. The definitions of "class" and "equity security" are broad,<sup>60</sup> and the definition of "equity security" would include bonds convertible into common and preferred stock, whether voting or non-voting.<sup>61</sup> Because of the broad language of the bills, it would appear that their disclosure requirements would be applicable to tender offers for more than five per cent of a class of non-voting preferred stock or certain convertible bonds. Regulatory control over such acquisitions would seem to be unnecessary, because, in most instances, such acquisitions would probably not change or influence the control of the issuer.

The disclosure requirements of the proposed take-over legislation relate to acquisitions of securities registered pursuant to Section 12 of the Exchange Act. The vast majority of over-the-counter securities are not registered pursuant to section 12,<sup>62</sup> and thus these disclosure require-

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<sup>58</sup> For a discussion of rule 154, see SOWARDS, *THE FEDERAL SECURITIES ACT* § 4.04(3) (1965).

<sup>59</sup> *Ibid.* See also SEC Securities Act Release Nos. 4669, June 4, 1964; 4818, Jan. 21, 1966.

<sup>60</sup> See notes 30 and 31 *supra*.

<sup>61</sup> *Ibid.*

<sup>62</sup> As of June 30, 1965, 1,506 over-the-counter issuers out of an estimated 40,000 in the United States had registered pursuant to the requirements of Section 12 of the Securities Exchange Act of 1934. SEC, 31st ANNUAL REPORT 2 (1965); LEFFLER, *THE STOCK MARKET* 5 (3d rev. ed. 1963).

ments would apply to relatively few over-the-counter issuers. Although the Special Study of Securities Markets recommended that registration, reporting and proxy regulation be extended to over-the-counter issuers with 300 or more shareholders and \$1,000,000 in total assets,<sup>63</sup> the 1964 amendments to the Exchange Act extended these provisions to over-the-counter issuers with \$1,000,000 in total assets and 500 or more shareholders. In previous congressional efforts to broaden coverage under the Exchange Act, attempts were made to regulate over-the-counter issuers with 50,<sup>64</sup> 300<sup>65</sup> and 500<sup>66</sup> or more shareholders. It is submitted that the standard established by the 1964 amendments (500 or more shareholders) is inadequate in view of the large number of publicly held issuers which are not subject to the registration, reporting and proxy regulations and which would not be subject to the proposed take-over bid legislation. For adequate public protection it is submitted that the recommendations of the Special Study (300) be adopted.

A subsection of the proposed legislation makes the disclosure provisions applicable to cash tender offers "which, if consummated, would result [in the offeror] owning beneficially more than 5 per centum" of any class of certain securities. The wording of the bills makes it clear that the legislation would apply to offerors who owned less than five per cent of a class of securities and then, as a result of the consummated tender offer, beneficially owned more than five per cent of that class of securities. But, assuming that the offeror owned ten per cent of a class of securities subject to the disclosure provisions before a tender offer and then acquired ten per cent more, the wording of the proposed legislation is unclear as to whether or not this situation would come within its scope. This lack of clarity exists because, in the latter case, the consummated tender offer did not, in itself, result in the

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<sup>63</sup> SEC REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 5, 151 (1963).

<sup>64</sup> H.R. 7955, 82d Cong., 2d Sess. (1952).

<sup>65</sup> S. 2408, 81st Cong., 2d Sess. (1949).

<sup>66</sup> S. 1860, 82d Cong., 1st Sess. (1951).

offeror's owning more than five per cent of a class of equity securities; the offeror owned more than five per cent of a class of equity securities before the tender offer was consummated. This ambiguity should be eliminated upon revision of the bills.

The proposed legislation provides at the outset that "it shall be unlawful for any person" to make certain tender offers for certain securities unless he complies with disclosure requirements previously discussed. The words "it shall be unlawful" appear in Section 14 of the Exchange Act (the proxy legislation) and in rule 10b-5, and implied private rights of action have been held to exist under Section 14 of the Exchange Act for violations of that section<sup>67</sup> and under rule 10b-5 for violations of that rule.<sup>68</sup> Presumably, then, a private action could be maintained for violations of the proposed take-over bid legislation, although no provision of the Exchange Act or of the bills expressly grants anyone other than the Commission authority to institute proceedings.

Inasmuch as enactment of the take-over bid legislation would constitute an amendment to the Securities Exchange Act of 1934, the remedies or courses of action expressly provided for violations of that Act would apply to violations of the proposed legislation. Accordingly, in its enforcement of the proposed take-over bid legislation and the rules adopted thereunder, the Commission could (1) conduct investigations;<sup>69</sup> (2) publish information relating to violations;<sup>70</sup> (3) bring disciplinary proceedings when the wrongdoer is a broker, dealer or exchange member;<sup>71</sup> (4) delist securities which are involved in violations of

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<sup>67</sup> J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

<sup>68</sup> See, e.g., Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); Matheson v. Armbrust, 284 F.2d 670 (9th Cir. 1960). See also Painter, *Inside Information: Growing Pains for the Development of Federal Corporation Law under Rule 10b-5*, 65 COLUM. L. REV. 1361 (1965).

<sup>69</sup> Securities Exchange Act of 1934, § 21, 48 Stat. 899, 15 U.S.C. § 78u (a) (1964).

<sup>70</sup> Securities Exchange Act of 1934, § 21, 48 Stat. 899, 15 U.S.C. § 78u (a) (1964).

<sup>71</sup> Securities Exchange Act of 1934, § 15, 48 Stat. 895, as amended, 78 Stat. 570-73 (1964), 15 U.S.C. § 78o(b) (1964).

the legislation;<sup>72</sup> (5) request the Attorney General of the United States to prosecute willful offenders;<sup>73</sup> (6) seek injunctive relief in the district courts.<sup>74</sup>

#### TAKE-OVER BID LEGISLATION IN OTHER COUNTRIES

SEC Chairman Cohen has stated that the Commission examined the laws and regulations governing take-over bids in Australia, France, Germany, Italy, the Netherlands, England and Ontario before making comments on the proposed United States legislation.<sup>75</sup>

A bill regulating take-over bids was recently introduced in the Ontario, Canada legislature,<sup>76</sup> but has not yet been enacted. This bill includes certain provisions which would obviate some of the problems existing under the bills introduced in the United States Congress. For example, the proposed Ontario legislation provides that shares deposited pursuant to a cash tender offer may not be "taken up and paid for" by the offeror until seven days after the making of the offer. During this seven day period, certificates which have been deposited may be withdrawn at the option of the depositors.<sup>77</sup> Furthermore, take-over bids must remain open for a period of fourteen days after the initial seven day period during which tendered shares may be withdrawn. Thus, the Ontario bill provides for a minimum period of 21 days during which shareholders may carefully consider the take-over bid. The United States bills do not prescribe a minimum period during which the take-over bid must remain open, and no provision is made for the withdrawal of tendered shares.

The proposed Ontario legislation also provides that the offeror must accept shares on a pro rata basis if the number

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<sup>72</sup> Securities Exchange Act of 1934, § 19, 48 Stat. 898, 15 U.S.C. § 78s(a) (1964).

<sup>73</sup> Securities Exchange Act of 1934, § 32, 48 Stat. 904, 15 U.S.C. § 78u(e) (1958).

<sup>74</sup> See note 44 *supra*.

<sup>75</sup> Cohen, *supra* note 4.

<sup>76</sup> For the background and reasons for the proposed Ontario legislation, see REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON SECURITIES LEGISLATION IN ONTARIO (1966).

<sup>77</sup> *Id.* at 24.

of shares tendered is greater than the number specified in the offer.<sup>78</sup> This rejection of the theory of "first come, first served" helps prevent a rush by shareholders to accept the tender.

The proposed legislation also contains provisions to insure that an offeror who subsequently raises the price for tendered shares be required to pay the higher price for shares accepted on the first offer as well as on the second offer.<sup>79</sup> These provisions eliminate many of the previously discussed inequities which would exist under the proposed United States legislation.

The purpose of the proposed Ontario legislation is to provide shareholders with sufficient material facts so that they may make informed investment decisions.<sup>80</sup> To implement this goal, the proposed Ontario legislation requires the disclosure of the following information:

- (1) the number and designation of any securities of the offeree company owned by the offeror, offeror's directors and executive officers and each holder of more than 10% of any class of equity securities of the offeror company;
- (2) the number and designation of any securities of the offeree company traded by the above named persons for the six months preceding the date of the offer;
- (3) the particulars of an offer conditioned upon acceptance of a minimum number of shares;
- (4) the particulars of the method and time of payment for shares tendered;
- (5) the fact that an offer is made on behalf of an undisclosed principal;
- (6) certain information regarding the trading of the securities sought to be acquired;
- (7) arrangements between the offeror and directors or executive officers of the offeree company as to compensation for loss of office or arrangements as to remaining in or retiring from office;
- (8) particulars of any information which indicates any material change in the financial position of the offeree company since the date of the last published financial statement.<sup>81</sup>

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<sup>78</sup> *Id.* at 25.

<sup>79</sup> *Id.* at 26.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Id.* at Appendix B.



It should be noted that the above requirements contain no provision for disclosure of the offeror's reasons for seeking control of the offeree company. However, the Ontario bill requires that the offering letter be accompanied by a prescribed take-over bid circular. This circular must contain the above-described information. Thus, the proposed Ontario legislation does require actual distribution of some information to shareholders. As previously mentioned, under the proposed United States legislation, no information statement need be distributed to shareholders with the document inviting tenders.

A weakness in the Ontario legislation regarding take-over bid circulars is the absence of a requirement that such circulars be reviewed by or filed with the Ontario Securities Commission.<sup>82</sup> Another significant weakness in the Ontario bill is its failure to require the disclosure of the identity of offerors.<sup>83</sup> It is submitted that the identity of the offeror is sufficiently important to the shareholder in making an investment decision that such information be required in all take-over bid circulars.

The proposed Ontario legislation does not require the offeror to submit a take-over bid to the offeree company before it is submitted to the shareholders.<sup>84</sup> In this respect, the Ontario bill differs from the proposed United States legislation and the Licensed Dealer Rules of the United Kingdom Board of Trade which regulate take-over bids.<sup>85</sup>

Aside from its meritorious provision for actual distribution of information to offeree-shareholders, for pro rata acceptance of shares, and for acceptance of all shares for the same price, the proposed Ontario legislation fails to furnish that high degree of investor protection afforded by the proposed United States legislation.<sup>86</sup>

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<sup>82</sup> *Id.* at 26.

<sup>83</sup> *Id.* at 25.

<sup>84</sup> *Id.* at 23.

<sup>85</sup> *Ibid.*

<sup>86</sup> However, the Ontario legislation was designed, as the *Kimber Committee* explains, to meet the peculiar financial needs of the Province of Ontario. See REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON SECURITIES LEGISLATION IN ONTARIO (1966).

## CONCLUSION

Existing statutes, rules and regulations inadequately deal with the problem of cash tender offers. This inadequacy constitutes a serious gap in securities regulation which should be filled by the enactment of express legislation.

Proposed legislation in the United States and in other countries constitutes a move forward. But such proposals fall short of achieving that balancing of interests of bidders and management necessary for sound investor protection. Before making a cash tender offer, bidders should be required to file pertinent material with the Securities and Exchange Commission to ascertain whether there has been compliance with full and fair disclosure requirements. In this respect, however, bidders and management should be placed on an equal footing; filing should be made on a confidential basis to prevent advance mobilization by management. Additionally, management's statements and materials in opposition to or in support of the cash tender offer should be subject to the same disclosure standards as those established for bidders. Even more important, full and fair disclosure should not be limited to filing information statements with a regulatory agency. Rather, it should include actual distribution (upon expiration of the waiting period) of such statements to shareholders before their investment decisions are made.

Enactment of adequate legislation in this important area of securities regulation would implement investor protection in a manner that should instill confidence in the investment community.