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F-10
Tender offers

United States Senate

COMMITTEE ON BANKING, HOUSING, AND
URBAN AFFAIRS

WASHINGTON, D.C. 20510

July 3, 1979

CHAIRMAN'S OFFICE
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EXCH. COMM.

The Honorable Harold M. Williams
Chairman
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

Dear Mr. Chairman:

By comparison to the events we are witnessing today, the merger mania of the last decade which led to the enactment of the Williams Act in 1968, was modest. In 1969, some \$24 billion dollars worth of corporate combinations occurred. For 1979 that figure may reach \$43 billion or higher. Moreover, the nature and conduct of battles for corporate controls have changed markedly, raising for the first time questions about the efficacy of professional ethics and existing safeguards to protect investors and shareholders from abuse. These developments suggest strongly the need to review the adequacy of existing law and policy towards this increasingly important economic activity.

The purpose of this letter is to obtain the views of the Commission on issues which the Committee intends to explore in depth in the months ahead. We have identified a number of areas, discussed in more detail below, for the Commission's consideration and response.

1. The Role of Banks in Tender Offers

The proposed tender offer for F. W. Woolworth Co., by Brascan Ltd., a Canadian Company, illustrates the problems present when a bank finances a cash tender offer while serving simultaneously as a significant creditor of either the target, the bidder, or both. In this particular case, a Canadian Bank was the principal source of funds for Brascan's offer. At the same time, the same bank was Woolworth's largest lender, having maintained a significant banking relationship with Woolworth since 1907.

In financing the proposed takeover transaction, a lender may rely on material non-public information or credit operating data furnished by the target company to the bank in connection with a prior or outstanding loan relationship. Another variation is that the bank may disclose such confidential information to the bidder without the target company's consent or knowledge. These and other aspects of bank involvement in tender offers are raised by the proposed takeover of Harnishfeger Corporation by Paccar Machinery Corporation and pending litigation, e. g., American Medicorp, Inc. v. Continental Illinois National Bank and Trust Company of Chicago, 77 C. A. 3865 (N. D. Ill. Dec. 30, 1977); and Washington Steel Corporation v. TW Corporation, 79 C.A. 166 (W.D. Pa. February 16, 1979).

We believe that fundamental public policy issues are raised by the mere opportunity for the misuse by banks of privileged information or the breach of a confidential relationship. In view of the potential conflicts of interest inherent in these circumstances, we would like to know whether the federal securities laws presently reach the conduct of persons that abuse positions of trust in connection with the financing of tender offers, and, if not, what measures the Commission would suggest to remedy that shortcoming. While legislation may be particularly appropriate for commercial banks, we would appreciate your consideration of whether other financial intermediaries and advisers which may receive privileged information (and therefore be placed in positions with similar conflicts of interest) should be included. Such other entities may include investment banks, underwriters, and outside financial advisors and consultants.

2. Issuer Repurchase of Securities

The purchase of their own securities by corporations is neither a novel or uncommon problem. In recent years, however, the incidence of such repurchase tender offers has increased significantly and the tactics employed has caused considerable controversy and litigation. We are particularly concerned with the repurchase technique commonly called "going private".

We are concerned that existing Federal law may not provide ample protection to investors and shareholders of issuers engaged in a going private program. Of course, these programs are structured differently but they share a common purpose: to eliminate most or all of a corporation's public shareholders and avoid federal regulation. It is the effect on shareholders which prompts this inquiry.

The SEC's authority to regulate repurchase and going private tender offers is an unsettled area of the law, and we would like to

be advised of whether the Commission believes additional legislation in this area is called for. To aid us in understanding the present law, we request the Commission to review the following inquiries and provide us with appropriate responses:

(a) Should going private and repurchase tender offers be exempt from the disclosure requirements of Section 14(d) of the Exchange Act?

(b) Are the antifraud provisions of Section 14(e) and the rulemaking authority in Section 13(e) effective regulatory tools for the Commission?

(c) Please explain the relationship between Sections 13(d), 13(e) and 14(d) of the Exchange Act and so-called Section 15(d) issuers? In view of the large number of Section 15(d) issuers, and the increasing frequency of takeover attempts and issuer repurchases generally, would the goal of investor protection be enhanced by the specific inclusion of Section 15(d) issuers within Sections 13(d), 13(e), and 14(d) of the Williams Act?

3. Coverage of the Williams Act

On a previous occasion, we expressed our concern to the Commission about the "sudden and surreptitious" nature of Sun Company's acquisition of a controlling position in Becton, Dickinson and Company (copy attached). This particular case, now in litigation and awaiting decision, is illustrative of a disturbing trend of secretly orchestrated takeovers which often nullify the protections of the Williams Act.

The term "tender offer" is not defined in the statute as enacted and subsequently amended, because the Congress preferred to leave to the Commission and the courts the ability to deal effectively with transactions, not envisioned or imagined in 1968, which required the application of the statutory provisions of the Williams Act for the protection of investors. The wisdom of this flexible approach has been proved by the dynamic and ever-changing nature of tender offers.

Nevertheless, we would appreciate the Commission's views as to whether additional legislation is necessary to deal adequately with the changing techniques which are being employed to attempt to circumvent the safeguards created by the Congress in 1968 to govern the conduct of tender offers, such as open market or privately negotiated purchases, which frequently precede the announcement and commencement of a conventional tender offer. Specifically, we are interested in the Commission's views on whether the provisions of existing law adequately protect investors where a combination of such purchases and a subsequent tender offer are employed to obtain corporate control, and, if not, what amendments might be appropriate to remedy this deficiency.

4. Filing Requirements

Section 13(d)(1) of the Exchange Act was designed to alert shareholders, the marketplace, and the issuer to the fact that a person has acquired a substantial amount of securities of the issuers. It is clear that the prescribed filing requirements are activated at such time as a person becomes the beneficial owner of more than 5 percent of the stock of an issuer. However, since the Schedule 13D statement is required to be filed within ten days, additional purchases may be made during the 10-day period prior to the actual filing. A similar issue arises where a person who has filed a Schedule 13D becomes obligated to amend that filing, as the result either of an additional acquisition or a material change in the information contained in the original filing. Even before complying with the amendment requirement, that person may make yet further purchases.

We would appreciate the Commission's views as to whether the Commission believes it desirable to amend Section 13(d)(1) to provide a more appropriate system of disclosure in both of the contexts described above.

5. "Best Price Rule"

Section 14(d)(7) of the Williams Act has become known as the "best price rule." The legislative history of the Williams Act indicates that Section 14(d)(7) was intended to assure equality of treatment among all shareholders who tender their shares. (S. Rep. No. 550, 90th Cong., 1st Sess 10 (1967)). We understand that the Commission has endeavored to administer the best price rule to effectuate this legislative intent by requiring the offeror to pay the same consideration to all sellers pursuant to the tender offer. In light of the legislative history and administrative practice with regard to the "best price rule", we would like the Commission's opinion on whether the wording of Section 14(d)(7) should be specifically amended to confirm that it requires any person making a tender offer to pay the same consideration to all sellers pursuant to the tender offer.

6. Relationship Between State and Federal Tender Offer Laws

At the time Congress first amended the securities laws in 1968 expressly to recognize and provide for basic investor protections in tender offer situations, only one state had adopted tender laws of its own. Today, over thirty-five states regulate tender offers and legislatures in several other states are actively considering similar statutes.

Certain provisions of State and Federal law are compatible and complementary, rather than in direct conflict. Encouraging more uniformity between Federal and state tender offer laws will certainly avoid partial or total frustration of the Williams Act and assure more cooperation between the SEC and its state counterparts in assuring coordination and consistency in the interpretation and administration of tender offer regulation.

The proposed Federal Securities Code deals directly with the problems posed by the proliferation of the state tender offer statutes by preempting state law in most cases and, at the same time, strengthening the provisions of the Federal law by adding several provisions characteristic of state law, such as pre-effective filing requirements, extended offer periods, and expanded withdrawal and proration rights. This, of course, is not the only way of dealing with the problem of coordination.

We would be interested in learning the Commission's views and recommendations about how the Federal and state interests in the regulation of tender offers may be harmonized within the context of a national law and a national policy.

7. Enforcement of the Williams Act

Recent Supreme Court decisions involving the Williams Act have had a mixed effect on the attainment of the purposes and policies of the Federal securities laws in general, and the tender offer provisions in particular. In Rondeau v. Mosinee Paper Corp., the Court limited the injunctive relief available against one who has violated the statute and subsequently corrects that violation. More recently, in the Piper v. Chris Craft case, the Court ruled that a defeated tender offeror does not have standing to sue a target or a competing offeror for damages suffered due to violations of the statutes. Of course, numerous other recent Supreme Court decisions, involving other aspects of the Federal securities laws, will also influence tender offer practices.

These judicial developments raise substantial questions about the enforceability of the Williams Act. Private litigation often supplements the SEC's own enforcement program and promotes the purposes of the securities laws without creating a large and expensive bureaucracy. Because many of these decisions may impede or preclude private suits by creating unintended and unwise obstacles to the maintenance of such actions, we are interested in reviewing whatever proposals the SEC has developed in light of its experience to restore to aggrieved persons access to the Federal courts in tender offer situations.

The Honorable Harold M. Williams
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These are, in brief, some of the areas which we believe should be reviewed by the Committee with the assistance of the Commission. There may well be other areas which the Commission may wish to bring to our attention relating either to tender offers or issuer repurchases where the Commission feels it is necessary to recommend additional legislation and we encourage the Commission to do so. We realize that the questions raised herein involved complex issues and therefore request a response in 90 days. We thank you in advance for your cooperation with the work of this Committee.

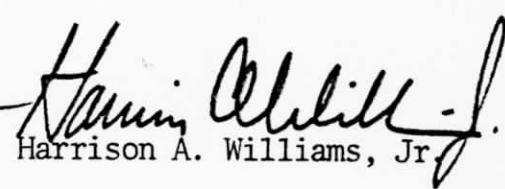
Sincerely,



William Proxmire



Paul S. Sarbanes



Harrison A. Williams, Jr.