



1985

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October 22, 1985

**John Wheeler, Secretary**  
**Securities and Exchange Commission**  
450 Fifth Street, N.W.  
Washington, D.C. 20549

**Re: NASAA Tender Offer Committee**  
**Comment Letter to Proposed Commission Rules**  
**Regarding Tender Offers/File Nos. S7-34-85**  
**and S7-35-85**

Dear Mr. Wheeler:

For some time the Tender Offer Committee of the North American Securities Administrators Association ("NASAA") has been involved in consideration of federal and state tender offer regulatory issues. This Committee has submitted comments regarding numerous previous Commission proposals under federal law and rule provisions regulating take-over offers. Our comments in those instances, as well as in this case, are from this Committee's dual perspective of concern for the protection of public investors in NASAA member jurisdictions, and interest in the impact of federal legislation and rule-making on areas of state law.

The Committee has several points it wishes to raise by way of comment to the Commission's proposed rules regarding tender offer practices as set forth in File Nos. S7-34-85 and S7-35-85. As an initial matter, the Committee wishes to express its support for those proposed amendments to Rule 13e-4 under the Securities Exchange Act that are intended to bring issuer tender offer rules into conformity with those governing third-party tender offers -- namely, the amendments that would require an issuer tender offer subject to the rule to remain open for a minimum period of 20 business days and that securities be accepted on a pro rata basis throughout the offer. This Committee agrees

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that the current disparity between issuer and third party offers regarding timing period and pro-ration requirements can be confusing to and complicated for public investors, and the Committee supports those proposed rule amendments.

The substantive comments this Committee wishes to raise relate to proposed Rule 14d-10 and amendments to Rule 13e-4 under the Securities Exchange Act/Williams Act. Those proposals would require corporate issuers to extend a tender offer to all securities holders of the class of securities subject to the offer, and to pay any securityholder who tenders pursuant to the offer the highest consideration offered to any other securityholder at any time during the offer. For purposes of this comment letter, those rule proposals will be referred to as the "all holders" and "best price" rules. The Committee has the following comments with regard to those rules:

1. Lack of Commission Authority

The Committee questions the Commission's authority to engage in rule-making on this subject, both in light of the language of the Securities Exchange Act/ Williams Act, and the recent U.S. Supreme Court decision in Schreiber v. Burlington Northern, Inc. (105 S.Ct. 2458 (1985)). This Committee views the proposed "all holders/best price" rules as applied to issuer offers as an attempt by the Commission to inject an element of fairness into the regulatory requirements for tender offers under the federal securities laws. On that subject, the Burlington Northern decision determined, in the context of a section 14(e) claim, that the element of fairness is not a permissible consideration in cases seeking relief under the Williams Act. Inasmuch as the Supreme Court has concluded that fairness regulation is not permissible under the current language of the Williams Act, Commission rule-making regarding fairness considerations is even more clearly impermissible and is clearly ultra vires.

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Further, the Burlington Northern decision pointed out that the validity of target company defensive activity, absent fraud or manipulation, is a state law question. Consequently, any intrusion on the federal level into state law matters may be done only by Congress, not through Commission rule-making.

Also, when it is recognized that the Unocal-type discriminatory issuer tender offer sought to be prohibited under the "all holders" rule is merely the flip side of the "greenmail" coin (in that an issuer's repurchase of a "greenmailer's" shares at a price higher than the existing market price of the stock also amounts to discriminatory issuer treatment of shareholders), the inappropriateness of the Commission's rule-making attempt in this area is apparent when contrasted with the Commission's 1984 recommended treatment of the "greenmail" problem. As may be recalled, when the Commission sought in 1984 to deal with the fairness consideration of equal treatment for all shareholders in the greenmail context, the Commission recognized that dealing with that fairness issue necessitated Congressional legislative change to the Williams Act. Specifically, at that time, the Commission proposed legislation in H.R. 5693 to deal with the unfairness issue in the "greenmail" context.

2. Approach Ineffective

The releases accompanying the Commission's rule proposals indicate that the proposed "all holders/best price" rules are "intended to further equal treatment of all security

holders." It is the Committee's view that the proposed rules would be ineffective in achieving that result for the following reasons:

a. Easy to Evade Applicability of Rules.

Under the current language of the Williams Act, before any of its requirements or any rules thereunder are applicable, a "tender offer" must be present. The Commission's proposed "all holders/best price" rule proposal, standing alone, would not achieve its intended result because it would enable, and probably encourage, discriminatory repurchase transactions by issuers to be made outside the coverage of the Williams Act and rules thereunder by means of private, negotiated transactions between the issuer and institutional investors or arbitrageurs. In such situations, and as so often occurs under the current federal take-over regulatory scheme, the issuer's public shareholders are the "losers"--in this case because they would not be included in any of the private, non-regulated transactions.

b. Equal treatment of all security holders only possible under "Lipton" approach amendments to the Williams Act.

Given that the Commission's avowed intent is to provide for the equal treatment of all securityholders, and because of the relative ease with which applicability of the proposed "all holders" rule can be evaded, it is the Committee's position that the only effective manner in which the Commission could insure equal treatment for all shareholders would be to endorse the concept of the so-called "Lipton" approach in legislation enacting

statutory changes to the Williams Act. The essence of those proposals (both in 1984 legislation in H.R. 5694 and in 1985 legislative proposals to Rep. Wirth) corresponds to the Commission's "equal treatment" objective by requiring any person who obtains a specified percentage of stock ownership to make an offer to all securityholders for all shares on equal terms. If the Commission is looking for an effective vehicle to enact an equal-treatment-to-all/fairness approach to the federal regulatory scheme, this Committee urges the Commission to endorse the Lipton approach to acquisitions of an issuer's shares by third parties and to acquisitions by the issuer itself.

In that manner, not only will the abusive bidder tender offer practices of "creeping" tender offers and coercive two tier offers be eliminated, the target company defensive practices involving issuer share repurchase transactions that the Commission unsuccessfully sought to address by court action in SEC v. Carter Hawley Hale Stores, Inc. (May, 1985) will also be covered by such legislative treatment. As this Committee has noted in previous commentary in support of this legislative approach, enactment by Congress of such a proposal would not prohibit hostile takeover offers. Rather, it would ensure that all shareholders of the issuer would receive equal treatment for all their shares -- whether in issuer transactions or third party/bidder transactions.

3. Rules Represent Symptom-Treatment Approach

This Committee agrees with other commentators that it is anomalous for the Commission to single out and prohibit by rule an issuer's

utilization of the Unocal-type discriminatory tender offer. The proposed "all holders" rule represents yet again the Commission's "symptom-treatment" approach to federal tender offer regulation as evidenced in the Commission's 1984 legislation in H.R. 5693 which proposed various amendments to the Williams Act. That 1984 proposed legislation consisted of a "laundry list" of prohibited defensive practices in vogue at the time of the bill's introduction--including "greenmail" repurchases, "golden parachutes", "lock-ups" and "poison pills". As this Committee commented in its April 23, 1985 letter to Representative Timothy E. Wirth in connection with his House Telecommunications Committee hearings regarding possible areas of amendment to federal take-over regulation, a regulatory approach dealing only with symptoms is doomed to be ineffective. As mentioned above, this Committee contends that the only effective way to deal with the equal-treatment-for-all-shareholders concern is to have Congress amend the Williams Act to require that if an acquisition of an issuer's shares--by a third party bidder or the issuer itself--exceeds a prescribed percentage level, an offer must be made to all shareholders.

4. Commission Preoccupation with Preemption of State Law

The proposed "all holders" rule also appears to involve yet another Commission attempt to, by rule, preempt state law regulating tender offers.

The Commission's first foray in that regard was its so-called "five and go" 14d-2(b) rule enactment in 1980 that purposefully created an irreconcilable conflict under the Supremacy

Clause of the U.S. Constitution between the commencement requirement in that Commission rule and the 10 day precommencement waiting period requirements in most "first generation" state take-over laws. The Commission's proposed "all holders" rule could, arguably, support assertions that an irreconcilable conflict may be created under the Supremacy Clause with the "second generation"/post-MITE revised take-over laws in Minnesota and Wisconsin. Following the U.S. Supreme Court's 1982 decision in Edgar v. MITE that pointed to the extraterritorial aspects of the Illinois Take-Over Law as the principal basis for concluding that the Illinois law was unconstitutional on Commerce Clause grounds, the take-over laws in Minnesota and Wisconsin were amended in several respects. The principal amendments related to: (1) eliminating the extraterritoriality provisions in each law by providing that any regulatory determinations under the law applied only with respect to offers in that state; (2) adding stronger state nexus requirements regarding minimum number of resident shareholders and substantial asset/principal office requirements that must be present before state law jurisdiction over a take-over offer can attach; and (3) eliminating all timing and procedural conflicts between the Williams Act and the state take-over law requirements.

The Commission's proposed "all holders" rule seeks to create an irreconcilable conflict situation with the "second generation" Minnesota and Wisconsin take-over laws in the following respect. Where, for instance, the Minnesota revised take-over law contains a provision enabling Minnesota to deny the take-over offer subject to the law from being made in Minnesota, the Commission's proposed "all holders" rule could give rise to an argument that an irreconcilable conflict

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may be created by application of the requirement under the rule that all holders of the target company's shares--in whatever state they might reside-- must receive the offer.

As the Commission is aware, the Eighth Circuit Court of Appeals in Cardiff Acquisitions, Inc. v. CONWED Corp. (751 R.2d 906 (1984)) expressly upheld the constitutional validity of the revised Minnesota second-generation take-over law on Commerce Clause and Supremacy Clause grounds as a proper exercise of the state's power to protect its resident securityholders. Consequently, the Commission's rule-making with regard to the "all-holders" proposal is a blatant back-door attempt at state law preemption. Any action to preempt an area of state law--especially where the federal courts have specifically legitimized that exercise of state law authority on Commerce Clause and Supremacy Clause grounds--must come from Congress. It cannot and should not come from Commission rule-making which, being based on fairness considerations, is beyond the Commission's authority under the Williams Act.

5. Conflicts With The Concept of Federalism and National Initiatives and Policies

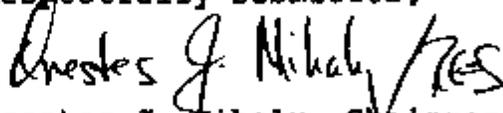
It is the Committee's position that the proposed "all holders" rules are contrary to the current administration's philosophy of federalism in preserving state autonomy over traditional matters of state governance. . These policies are especially importantly in such areas as state corporation law, the

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business judgement rule under state corporation law, and protecting resident investors. The President's Council of Economic Advisers has recognized that the business judgement rule--an area reserved to state law considerations--should control questions regarding corporate defensive practices such as discriminatory issuer tender offers. The regulation of the internal affairs of corporations and application of the business judgement rule has traditionally been reserved to the states by the courts. Any action by the federal government to encroach upon state corporation law and the business judgement rule may take place only through Congressional action where duly elected state representatives authorize federal usurpation of those areas of traditional state authority.

The NASAA Tender Offer Committee appreciates this opportunity to present its views and comments with respect to the Commission's proposed tender offer rules. If there are any questions, or additional information is required regarding any of the matters discussed above, please call Committee Chairman Orestes Mihaly of New York at (212) 488-7563 or Committee Vice Chairman Randall Schumann of Wisconsin at (608)266-2139.

Respectfully submitted,

  
Orestes J. Mihaly, Chairman  
NASAA Tender Offer Committee

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RES:mk