(1981)

REPORT OF THE TENDER OFFER COMMITTEE OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

AND

UNIFORM TAKE-OVER ACT

Dated: Atlanta, Georgia
October 12, 1981

REPORT OF THE TENDER OFFER COMMITTEE OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

On April 29, 1981 the North American Securities Administrators Association, Inc. approved the distribution of a draft of a proposed Uniform State Take-Over Act for comment by its Tender Offer Committee. The draft was circulated widely and the period for comments expired on July 17, 1981. Thereafter, the Tender Offer Committee's subcommittee on the Uniform Take-Over Act met at Hyannis, Massachusetts on September 18, 19 and 20 and adopted the attached as its proposed Uniform Take-Over Act to be submitted at the 64th Annual Convention of NASAA in Atlanta, Georgia on October 11-14, 1981.

Most commentators stated that the draft was a laudable attempt to meet the constitutional challenges that had been previously addressed in litigation involving state take-over statutes. Several commentators urged that the adoption of the proposed Uniform Take-Over Act be delayed until after the Supreme Court rules in Edgar v. MITE Corp., which is scheduled for argument in the Fall of 1981, sometime after the NASAA Conference. This was the first issue that was resolved by the Tender Offer Committee. The Committee has concluded that there was insufficient reason to delay the adoption of the Uniform Take-Over Act. Many states whose statutes have been declared unconstitutional in court challenges are in the process of proposing or enacting new state legislation. In at least one state, the draft version of the Uniform Take-Over Act is being considered as the basis for new legislation. The Committee believes that it is important for NASAA to adopt a uniform approach irrespective of what the Supreme Court holds. Appropriate additions or adjustments can be made by this Committee after a ruling by the Supreme Court. In any event, the adoption of this proposed Uniform Take-Over Act by the Committee or by NASAA is not intended to indicate any acquiescence to the arguments of alleged constitutional infirmities. The adoption of the Uniform Take-Over Act would merely reflect the continued desire of NASAA to create maximum uniformity in state regulation of securities while still providing an effective state presence. The Committee maintains that the proposed Uniform Take-Over Act now adequately meets the challenges heretofore made on state take-over statutes based on the presence of alleged constitutional infirmities. However, the Committee recognizes that alternate methods exist for addressing the arguments of constitutional infirmities.

The Committee believes that by limiting the jurisdiction of the Uniform Take-Over Act to the state of incorporation, all arguments relating to the objectionability of multi-state regulation of take-over offers will be eliminated. This approach conforms to the traditional philosophy that the

regulation of take-over offers is properly within the purview of the state's authority as a matter of corporate law. Regulation of corporate change of control is a legitimate interest for state law.

There is no need for any specific comity provision among sister states since the uniform law provides for jurisdiction only where the subject company is incorporated in the state. One commentator felt that the subject company should be defined to give jurisdiction to any state where a significant number of offerees reside. The Committee believes that this is a less desirable standard than the state of incorporation or organization approach.

The proposed uniform statute also eliminates the often made argument that take-over statutes in general are discriminatory in that they do not apply to friendly offers. All offers are covered in the proposed Act.

Another focal point of attention was Section 3(j) which defines a take-over offer. Commentators saw many problems in connection with the draft's proposal to include all means of acquisition in excess of 10% of the equity securities of a subject company. The Committee has decided to eliminate that part of the definitional section so that the Act now only concerns itself with "classic" tender offers.

The original purpose of state take-over laws was to eliminate the abuses caused by so-called "Saturday night special" tender offers whereby offerors quickly acquired the shares of subject companies without full and fair disclosure to subject company shareholders and without giving such shareholders adequate time to study the terms and conditions of the tender offer. The state take-over laws and amendments to the federal tender offer rules have relieved the time pressures and lack of adequate disclosure to some degree. However, new techniques and methods of acquisition by offerors, including the so-called "creeping" tender offers where an offeror first obtains a significant position in the securities of a proposed subject company by open market purchases and privately negotiated transactions, have led to similar abuses in time pressure and lack of full and fair disclosure.

It is suggested by the Committee that the issue of creeping tender offers is best regulated in the federal arena. However, we believe that the federal law and its implementation have been less than effective in eliminating these abuses. We strongly urge that the Securities and Exchange Commission focus on this problem area and that NASAA offer to confer with the SEC concerning further regulation of creeping tender offers. This is especially appropriate in light of Chairman John S. R. Shad's announcement of August 25, 1981 indicating a desire for increased cooperation with the states in the tender offer area.

In the meanwhile, the Committee recommends that the proposed Uniform Take-Over Act not include any specific reference to creeping tender offers. The Committee will continue to examine this area and will propose appropriate amendments, if necessary to the Uniform Act after the Supreme Court's decision in Edgar v. MITE. Those states wishing to enact take-over acts incorporating creeping tender provisions should consider including one of the following alternatives in addition to the Act.

The first alternative would be to amend Section 3(j) of the Act by adding thereto the following language:

> "If an offeror acquires in excess of ten percentum of the outstanding equity securities of the subject company by any means, a rebuttable presumption shall exist that such acquisition is a take-over offer."

This approach, which was included in the April 27, 1981 draft of the Act, places the burden upon the offeror to persuade the administrator or the courts that the offeror is not engaged in a take-over offer. The administrator is empowered to adopt appropriate regulations to specifically set forth the requirements that the offeror must meet when the offeror reaches the 10 percent level.

The second alternative would require the addition of a specific section to the Act containing a provision barring commencement of a formal tender offer under certain circumstances. The Committee suggests the following language as appropriate:

> "(a) No person shall make a take-over offer, pursuant to a registration statement filed under §5 or §8 or otherwise, if:
>
> (i) he owns five percentum (5%) or more of the issued and outstanding equity securities of any class of the target company; and
>
> (ii) any of such securities were purchased within 1 year before the proposed take-over offer; and
>
> (iii) such person before purchasing such securities, or before [the effective date of this chapter, act], whichever is later, failed:

(A) to make a public announcement fairly and accurately stating his intention to gain control of the target company; or

(B) otherwise failed to make full, fair and effective disclosure of such intention to the persons from whom he acquired such securities."

The practical effect of this proposition would be to place an offeror who has failed to disclose its intentions in a timely manner in the "penalty box" for a one-year period.

Also included in the arguments of commentators who took exception to the provision in the Committee's draft which specifically regulated open market purchases was the contention that Congress considered and rejected the idea that an offeror had to comply with registration or notification requirements prior to acquiring stock in the open market or in private negotiations. The Committee believes that this argument of Congressional rejection as binding upon the states is fallacious. On the basis of the experience of the states in take-over regulation, the contention by commentators that open market purchases and private transactions are adequately regulated by disclosure filing requirements (Schedule 13D) is completely without merit.

However, the Committee wishes to advise (as a matter of setting forth legislative intent) that it intended to propose the idea that once an offeror conducting an open market acquisition program approached the ten percent level, then the registration requirements of the Act were triggered and the offeror proceeded at its peril. It was presumed that purchasers of amounts up to 10% were acquiring the shares for investment purposes and the purchases were not made in violation of the statute.

One commentator inquired whether the definition could have been broad enough to cover acquisiton by gift, bequest or intestate succession. The Committee did not intend the definition to be that broad. The use of the registration process would not make sense when the acquisition does not involve the purchase of shares. The definition would have been appropriately modified had the broader definition been finally proposed. In rejecting the broader definition the Committee was aware of the line of cases holding that privately negotiated transactions and open market purchases effected without widespread solicitations of offers or orders to sell are not take-over offers under state take-over laws and believed that the less expansive definition would be less vulnerable to constitutional challenge.

The Committee eliminated § 4(e) through (h) of the draft submitted for comments and instead added new § 4(e) which gives the administrator broad discretion to exempt those take-over offers that have been scrutinized by federal or other state regulatory agencies. The Committee concluded that the previous language which presently exists in many state statutes fails to recognize that some of the regulatory agencies do not affirmatively approve offers, but are only granted the power to disapprove. This has caused confusion and difficult interpretations as to availability of the exemptions. The Committee also agreed that the administrator should have discretion to indicate other categories of regulatory agencies whose presence would trigger an exemption, such as state banking or insurance agencies.

The Committee recognized the need to regulate the activities of subject companies in take-over offers by requiring the subject companies as well as offerors to file certain offeree solicitation materials with the administrator. Thus a new § 5(f) has been added.

Another commentator objected to potential delays resulting from the ability of the administrator to prohibit the purchase or payment for shares pending the administrator's determination, which is limited by the proposed statute to a maximum sixty day period. This objection is rejected for several reasons. The Act does not prevent the take-over offer from proceeding, nor does it prevent the shareholders from tendering their shares or selling them on the open market at a price usually somewhere near the tender offer price. This approach, recognizing the permissibility of regulatory approval prior to consummation, is similar to that adopted by Congress and recognized by the SEC as a legitimate regulatory prerogative. See, 44 Fed. Reg. 70,330 (1979).

In addition, if the administrator found that the offer had proceeded without full and fair disclosure of all material terms, it virtually would be impossible to "unscramble the eggs" after the take-over offer had been consummated. The Committee is aware that many tender offers remain extant for periods in excess of sixty days without any regulatory intervention by federal or state regulators. Studies and the experience of state administrators demonstrate that "delays" in the consummation of tender offers result in higher premiums being paid to shareholders and such delays are therefore in the public interest. Furthermore, the federal law specifically allows the offeror to lock up tendered shares for enumerated periods of time up to the sixtieth day of a tender offer. Therefore, both federal law and the proposed Act provide for a possible maximum 60 day period.

The power of the administrator to conduct investigations was clarified by the addition of § 12(b) and elimination of the requirement that an order of investigation be issued prior to the issuance of a subpoena. There is no requirement for an order of investigation in the proposed Act. The administrator may conduct his investigation at any time. If an order prohibiting purchase or payment is not issued within fifteen days the administrator may still issue such an order of prohibition at any time prior to the actual purchase or payment subject to the 60 day limitation contained in § 7.

With regard to non-Williams Act take-over offers, § 8 of the proposed Act now provides three requirements not in the previous draft. Section 8(a) requires the offeror to disseminate to offerees the information required in a § 5(b) registration statement as may be required by the administrator in appropriate regulations. The offeror is also required by § 8(b) to promptly disseminate information to offerees concerning any material changes in the offer and file such amendments with the administrator and the subject company. Section 8(h) authorizes the administrator to promulgate regulations prohibiting offerors from purchasing outside the take-over offer. With respect to § 8(a) the administrator may, pursuant to § 5(d), permit the omission of any information if he deems it to be immaterial or otherwise unnecessary for the protection of offerees.

The Committee recognized that its draft did not contain provisions for the imposition of civil liability on subject companies who engage in practices violative of the Act or causing damage to any person. Therefore, it amended § 9 to provide an express right of action under these circumstances. The Committee did not think it necessary to exclude administrators from the definition of person since the administrator would not be considered a violator of the Act under any circumstances.

The comments also included a request by a state administrator to provide the authority to seek monetary penalties in addition to felony prosecution in the event any person violates the provisions of the Act. The Committee agrees that this is a legitimate request for an enforcement tool and has provided for such authority in § 10 up to an amount of $100,000.

Section 11 of the proposed Act refers only to take-over offers. Any state which does not prohibit fraudulent practices in connection with tender offers under its Blue Sky law may wish to consider amending § 11 by adding the words "tender offer or request or invitation to tender" to the proposed Act.

The Committee did not classify in § 13 the nature of the felony, nor did it specify a statute of limitations for such crime. Because of the wide variance among the states in this

area, it was felt that each state should make this determination. In addition, the proposed Act provides no separate penalty for violation of a subpoena. Any state wishing to categorize such violation as a misdemeanor should make an appropriate amendment to the Act.

The Tender Offer Committee respectfully recommends the adoption of the proposed Uniform Take-Over Act by the membership of the North American Securities Administrators Association, Inc.

Dated: Atlanta, Georgia
October 12, 1981

Respectfully submitted
by the Tender Offer Committee

ORESTES J. MIHALY (New York)
Chairman

RANDALL SCHUMANN (Wisconsin)
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UNIFORM TAKE-OVER ACT

§1. SHORT TITLE. This Act may be cited as the [State] Uniform Take-Over Act.

§2. PURPOSE. The purpose of this Act is to provide protection to offerees and to the public by requiring that an offeror make full, fair and effective disclosure of all material facts necessary for the making of an informed decision about a take-over offer and to provide substantive rights of withdrawal and pro-ration to offerees where such rights are not accorded to them under federal law.

§3. DEFINITIONS. As used in this Act, unless the context otherwise requires, the term:

(a) "Administrator" means the Securities Administrator of this State.

(b) "Affiliate" means any person controlling, controlled by, or under common control with another person.

(c) "Associate" means:

(i) Any corporation or other organization of which the offeror is an officer, director or partner, or is, directly or indirectly, the record or beneficial owner of ten percentum or more of any class of equity securities;

(ii) Any person who is, directly or indirectly, the record or beneficial owner of ten percentum or more of any class of equity securities of the offeror;

(iii) Any trust or other estate in which the offeror has a substantial beneficial interest or for which the offeror serves as a trustee or in a similar fiduciary capacity; or,

(iv) Any relative or spouse of the offeror or any relative of such spouse who has the same home as the offeror.

(d) "Beneficial owner" includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has, shares, or has the right to acquire:

(i) Voting power which includes the power to vote, or to direct the voting of, an equity security; or,

(ii) Investment power which includes the power to dispose, or to direct the disposition of an equity security.

(e) "Control", including the terms "controlling", "controlled by", and "under common control with", means the possession 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.

(f) "Equity securities" means:

(i) In the case of a corporation, any securities issued by the corporation that represent an ownership interest in the corporation and to which are attached the right to vote on any matter, or any securities of the corporation that are convertible into such securities, including any warrant or right to subscribe to or purchase such securities; or,

(ii) In the case of a subject company which is not a corporation, any securities issued by such subject company that represent an interest in it and to which are attached the right to vote on any matter, or any securities issued by such subject company that are convertible into such securities of it, including any warrant or right to subscribe to or purchase such securities.

(g) "Offeree" means a person who is a record or beneficial owner of the equity securities of the subject company for which a take-over offer is made.

(h) "Offeror" means a person who makes a take-over offer, and includes two or more persons:

(i) Who make a take-over offer jointly or in concert; or

(ii) Who intend to exercise jointly or in concert any voting rights attached to the equity securities for which a take-over offer is made.

(i) "Person" means an individual, a partnership, a corporation, an unincorporated association, a trust, or any other entity or associate or affiliate of a person.

(j) "Take-over offer" means an offer to purchase or a request or an invitation to tender made by an offeror or his agent to offerees which, if accepted, will result in the offeror becoming directly or indirectly the record or beneficial owner of more than five percentum of any class of outstanding equity securities of a subject company.

(k) "Subject company" means an issuer of equity securities organized under the laws of this State whose equity securities are sought to be purchased in a take-over offer. The administrator may promulgate by order, rule or regulation any additional criteria, such as, but not limited to, the number or percentage of offerees residing in this State, that must exist before the issuer may be deemed a "subject company."

(l) The "date of commencement" shall be the earliest date on which a take-over offer is either published, sent or given to offerees in a manner in which offerees can tender their equity securities pursuant to the take-over offer.

§ 4. EXEMPTIONS FROM REGISTRATION REQUIREMENTS. The following transactions are exempted from the registration requirements of this Act:

(a) An offer made by an issuer to purchase its own equity securities or the equity securities of a subsidiary at least two thirds of the equity securities of which are owned either of record or beneficially by the issuer;

(b) Purchases by a broker registered with the Securities and Exchange Commission acting in an agency capacity to acquire any equity security in a transaction on a stock exchange or in the over-the-counter market if the broker performs only the customary broker's function and receives no more than the customary broker's commission, provided that such acquisition is made by such broker in good faith and not for the purpose of avoidance of §3(j) by the broker or the principal and neither the principal nor the broker solicits or arranges for the solicitation of orders to sell equity securities of the subject company;

(c) An offer to purchase equity securities of an issuer having less than 100 shareholders of record;

(d) An offer or offers to purchase equity securities which, if accepted, will result in the offeror purchasing two percentum or less of the outstanding equity securities of such class during the preceding twelve month period;

(e) An offer which the administrator by order, after notice to the offeror and to the subject company and opportunity to respond, shall exempt from the provisions of this Act as not being made, or to be made, for the purpose of, and not having the effect of, or to have the effect of, changing or influencing the control of the subject company, or otherwise as not comprehended within the purpose of this Act;

(f) An offer which is subject to substantive administrative review of its terms and conditions by a federal or state agency which the administrator determines by rule, regulation, or order has met the purposes of this Act.

§5. REGISTRATION STATEMENT AND RELATED FILINGS.

(a) No person shall make a take-over offer unless as soon as practicable on the date of commencement of the take-over offer, a registration statement containing the information required by §5(b) has been filed with the administrator and delivered to the subject company.

(b) The registration statement shall make full, fair, and effective disclosure of all material facts necessary for the making of an informed decision about the take-over offer and shall be in the form as may be prescribed by the administrator and shall contain the following information:

(i) a detailed description of the organization, capitalization and operations of the offeror, including:

(1) its name and principal business address;

(2) the date, form and jurisdiction of its organization;

(3) a description of each class of its equity and debt;

(4) the names of all directors and executive officers or those serving similar functions and a description of their material affiliations during the past five years and a description of the approximate amount of any material interest, direct or indirect, of any of such persons in any material transaction during the past five years or any proposed material transaction to which the offeror or any affiliate or associate was or is to be a party;

(5) a description of the business of the offeror and its affiliates and associates, the general development of their businesses and any material changes therein during the past five years;

(6) a description of the location and general character of the principal properties of the offeror and its affiliates and associates;

(7) a description of any pending judicial or administrative proceeding, other than routine litigation, to which the offeror or any affiliate or associate is a party or to which any of their property is subject, including any proceeding

which the offeror knows or has reason to know is being contemplated by any governmental authority;

(8) a description of any judicial or administrative proceeding during the past 5 years, other than routine litigation, to which the offeror or any affiliate or associate was a party and which resulted in any adverse order, decree, or judgment;

(9) a description of any criminal proceeding (excluding traffic violations) in which the offeror or any affiliate or associate or any officer or director, or those serving a similar function, of the offeror or any affiliate or associate was convicted or entered a plea of guilty or nolo contendere;

(10) a description of any tender offer made by the offeror or any affiliate or associate in the past 5 years and of any acquisition of another business made by the offeror or any affiliate or associate in the past 5 years and any material change in the organization or operation of such business;

(11) copies of such financial statements which the administrator may require, not to exceed audited balance sheets and income statements for each of the five most recent fiscal years and, for any period ending more than ninety days prior to the date of filing the registration statement, an interim balance sheet and income statement covering the period from the date of the last audited balance sheet and income statement to a date within ninety days of filing the registration statement.

(ii) a detailed description of the source and amount of funds or other consideration to be used in acquiring the equity securities of the subject company, including:

(1) a description of any securities which are being offered in exchange for the equity securities of the subject company;

(2) if any part of the funds or consideration will be represented by borrowed funds or consideration, a description of the transaction and the parties thereto;

(iii) a statement of the purpose of the take-over offer, including a description of any plan or proposal the offeror has to liquidate, merge or consolidate the subject company; to sell or transfer any material portion of its assets; to make any material change in its business or its structure, including its directors, executive officers or other personnel;

(iv) a description of any interest of the offeror or any affiliate or associate in the equity securities of the subject company, including:

(1) the number of equity securities of which the offeror or any associate or affiliate is the record or beneficial owner, or has the right to acquire directly or indirectly, the dates of acquisition and the consideration paid;

(2) any contracts, arrangements or understandings with any person with respect to any equity securities of the subject company including transfer of any such securities, joint venture, loan or option arrangements, puts or calls, guarantees of losses, guarantee against loss or guarantees of profits, division of losses or profits, the giving or withholding of proxies, voting arrangements or employment arrangements, identifying the persons with whom such contracts, arrangements or understandings have been entered into, and the details thereof;

(v) a description of any contracts, arrangements, understandings, or negotiations with any person who is an officer, director, administrator, manager, executive employee or record or beneficial owner of equity securities of the subject company with respect to the tender of any equity securities of the subject company, the purchase by the offeror of any equity securities owned by that person otherwise than pursuant to the take-over offer, the retention of any person in his present position or in any other management position or with respect to that person giving or withholding a favorable recommendation to the take-over offer, or the election or designation of any person as a director, or any similar function, of the subject company;

(vi) a description of the provisions made or to be made for communicating the take-over offer to offerees, including:

(1) the identity of all persons employed, retained, or compensated by the offeror or by any other person on its behalf to make solicitations of or recommendations to offerees regarding the take-over offer and a description of the material terms of such employment, retainer or arrangements;

(2) copies of all written materials to be used in soliciting offerees;

(vii) any other information, data, documents or exhibits which the administrator may require to be filed.

(c) If any material change occurs in the information contained in the registration statement, the offeror shall file promptly with the administrator and deliver to the subject

company an amendment to the registration statement describing such change.

(d) The administrator may permit the omission of any information required to be included in the registration statement if he determines that such information is immaterial or otherwise unnecessary for the protection of offerees.

(e) In connection with any take-over offer which is subject to §14(d) of the Securities Exchange Act of 1934, (15 U.S.C. §78n(d)), the administrator may permit an offeror to file any statement required to be filed with the Securities and Exchange Commission with such additions or modifications as the administrator may require consistent with §2 of this Act, in lieu of the registration statement prescribed by subsection (b) of this section.

(f) Subsequent to the filing of a registration statement, the offeror and the subject company shall file with the administrator any materials, including but not limited to letters, advertisements, news releases, and any other communication or material relating to the solicitation of offerees in opposition to or in favor of such take-over offer or any related take-over offer, request or invitation to tender within 24 hours of the dissemination of same.

§6. ORDERS OF PUBLIC HEARING.

Within 15 days of the filing of a registration statement pursuant to §5 or §8 of this Act, the administrator may by order schedule a public hearing concerning any take-over offer for the purpose of determining compliance with the requirements of this Act, and whether the offeror has provided full, fair and effective disclosure of all material facts necessary for the making of an informed decision about the take-over offer, including the filing of a complete and accurate registration statement. Any initial hearing shall commence within 25 days of the filing of a registration statement.

§7. PROHIBITION OF PURCHASE OR PAYMENT.

(a) The administrator may in his discretion issue an order prohibiting an offeror from purchasing or paying for any equity securities tendered in response to its take-over offer. Such order may be issued at any time prior to such purchase of or payment for such tendered securities, but in no event after 60 days after the filing of the registration statement.

(b) Any order issued by the administrator pursuant to subsection (a) of this section prohibiting an offeror from purchasing or paying for any equity securities tendered in response to its take-over offer shall automatically expire unless

within 30 days of the completion of a hearing or investigation held pursuant to §6 or §12(b) respectively of this Act or 60 days after the filing of the registration statement, whichever is sooner, the administrator shall have determined that there has not been compliance with the requirements of this Act, and shall have issued an order containing his findings of fact and conclusions of law prohibiting the purchase and payment for any equity securities tendered in response to the take-over offer or conditioning any such purchase and payment upon changes or modifications in the registration statement.

§8. REQUIREMENTS FOR CERTAIN TAKE-OVER OFFERS.

The following provisions shall also apply to take-over offers that are not subject to §14(d) of the Securities Exchange Act of 1934, (15 U.S.C. §78n(d)):

(a) No person shall make a take-over offer unless as soon as practicable on the date of commencement of the take-over offer, a registration statement containing the information in §5(b) has been filed with the administrator, delivered to the subject company, and sent, published or given to offerees in a form and manner as may be required by rule or regulation of the administrator;

(b) If any material change occurs in the information contained in the registration statement, the offeror shall file promptly with the administrator an amendment to the registration statement describing such change and send, publish or give such information to offerees and the subject company in a form and manner as may be required by rule or regulation of the administrator;

(c) The take-over offer shall be made to all offerees of the same class or series of equity securities on substantially the same terms;

(d) The period of time within which equity securities may be deposited pursuant to a take-over offer shall not be less than 20 business days;

(e) Equity securities deposited pursuant to a take-over offer may be withdrawn by an offeree by demand in writing to the offeror or the depository at any time within 15 business days after the date of the first invitation to deposit such securities and at any time after 60 days after the date of the first invitation to deposit such securities if the securities have not been purchased or paid for, and within 10 business days following the date of commencement of another offeror's take-over offer for the same equity securities;

(f) Where a take-over offer is made for less than all the outstanding equity securities of a class and where a greater number of such securities is deposited pursuant thereto than the offeror is bound or willing to take up and pay for, the equity securities taken up by the offeror shall be taken up as nearly as possible on a pro rata basis, disregarding fractions, according to the number of equity securities deposited by each offeree;

(g) Where an offeror varies the terms of a take-over offer before its expiration date by increasing the consideration offered to offerees, the offeror shall pay the increased consideration for all equity securities accepted, whether such securities have been accepted by the offeror before or after the variation in the terms of the offer;

(h) The administrator may, by rule or regulation, prohibit an offeror from purchasing equity securities of the subject company other than by the take-over offer during the course of such take-over offer.

§9. CIVIL LIABILITIES.

(a) An offeror who makes a take-over offer that does not comply in all material respects with the provisions of §5 or §8 of this Act; or who makes a take-over offer by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading (the offeree not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know of such untruth or omission, and in the exercise of reasonable care could not have known of such untruth or omission; or any person, including a subject company, who violates any provision of this Act shall be liable to any offeree whose equity securities are sold to the offeror pursuant to the take-over offer or any other person, including an offeror, damaged by such violation. shall be liable to

(b) Such offeree or other person may sue either at law or in equity and shall be entitled:

(i) to recover such equity securities, together with all dividends, interest or other payments received thereon upon the tender of the consideration received for such securities from the offeror; or

(ii) if the offeror no longer owns the equity securities, to recover such damages as the offeree shall have sustained as the proximate result of the conduct of the offeror which is in violation of this Act;

(iii) to recover any damages sustained as the proximate result of the conduct of any other person in violation of this Act.

(c) No civil action shall be maintained under this section unless commenced before the expiration of two years after the act or transaction constituting the violation.

(d) A person who successfully brings an action under this section shall be entitled to recover reasonable costs and attorney fees.

(e) The rights and remedies of this Act are in addition to any other rights or remedies that may exist at law or equity.

§10. INJUNCTIONS AND CIVIL PENALTY.

(a) Whenever it appears to the administrator that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Act, the administrator may in the administrator's discretion bring an action in any court of competent jurisdiction to enjoin such act or practice, to enforce compliance with this Act, and to impose a civil penalty not to exceed $100,000.00, or the administrator may refer such evidence as is available concerning violations of this Act to the Attorney General, who may, with or without such a reference, bring such an action. A subject company, an offeror or an offeree shall also have standing to bring an action in any court of competent jurisdiction to enjoin any person from any act or practice which constitutes a violation of this Act.

(b) Upon a proper showing, the court may (1) grant a permanent or temporary injunction or restraining order; (2) order rescission of any sales or purchases of equity securities determined to be unlawful under this Act; (3) impose a civil penalty not to exceed $100,000.00; and (4) award such other relief as it may deem just and proper, including directing the subject company to refuse to transfer such securities on its books and to refuse to recognize any vote with respect to such securities.

§11. FRAUDULENT, DECEPTIVE OR MANIPULATIVE ACTS.

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any take-over offer, or any solicitation of offerees in opposition to or in favor of any such offer. For the purposes of this section, the administrator may,

by rules and regulations, define and prescribe means reasonably designed to prevent such acts and practices as are fraudulent, deceptive or manipulative.

§12. FEES, RULES, REGULATIONS, FORMS, ORDERS AND INVESTIGATIONS.

(a) This Act shall be administered by the administrator who may promulgate rules, regulations, forms and orders necessary to carry out the purposes and provisions of this Act and who may set and charge such fees as the administrator shall deem reasonable and proper, considering the additional expense to the administrator by the filing of a registration statement by an offeror, but no such filing fee may exceed $3,000.

(b) In administering this Act, the administrator may conduct any investigation which the administrator deems appropriate, consistent with §2 of this Act. In connection with any such investigation, the administrator may require persons to file statements in writing and under oath with the administrator's office; require and receive such data and information as the administrator may deem relevant; and subpoena witnesses, compel their attendance, examine them under oath and require the production of books, records or papers.

§13. VIOLATIONS-PENALTIES.

Every person who wilfully violates any provision of this Act, or any order, rule or regulation issued pursuant thereto, shall be guilty of a felony.

§14. VALIDITY-SAVING CLAUSE.

In the event any provision or application of this Act shall be held illegal or invalid for any reason, such holding shall not affect the legality or validity of any other provision or application thereof.