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Developments in Tender Offers for Corporate Control. By Edward R. Aranow, Herbert A. Einhorn, and George Berlstein

J. William Robinson

BOOK REVIEW

DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL. BY EDWARD R. ARANOW,* HERBERT A. EINHORN,** AND GEORGE BERLSTEIN.*** New York, New York: Columbia University Press, 1977. Pp. xxi, 383. $57.50.

*Reviewed by J. William Robinson*****

When the corporate takeover scene was dominated by the proxy contest, Messrs. Aranow and Einhorn were there with the definitive treatise.[1] When the cash tender offer became the popular mode of combat in the late sixties, the two law partners and coauthors returned with a broad-based review[2] of that blossoming phenomenon. Their unique blending of legal theory and practice with the realities of corporate life and the market place has made it the basic source-book for lawyers, businessmen, the financial community, specialists, consultants, and others involved in corporate takeovers.

It would appear that the Aranow-Einhorn team thrives on challenges, for they have done it again with their recently published *Developments in Tender Offers for Corporate Control*. This time they are joined by their partner, George Berlstein, and assisted by their law associate, Terence L. Blackburn.

The new treatise differs from its companion volumes in the corporate takeover trilogy in that it is an update to the earlier tender offers volume rather than a revised second edition. This may be a disappointment to some who would have preferred complete revision, consolidating in a single volume the latest statutory and case references and the authors' insight into practical corporate and financial considerations. However, once the new volume is read and integrated with the earlier basic volume, any initial disap-

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1. E. ARANOW & H. EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL (2d ed. 1968).

2. E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL (1973).

pointment should rapidly dissipate. Together, these two volumes stand as a major contribution to the law and lore of tender offers and as a "must-have" addition to any library used by those having an interest in tender offers.

The authors' original volume on the subject was published just as the tender offer scene was emerging from a period of relative inactivity. A "torrent of tender offers,"[3] in the words of the authors, "burst upon the American scene"[4] as the first publication was being put to bed. Important court decisions, including the first cases in the United States Supreme Court interpreting the Williams Act,[5] were being handed down on a regular basis. The changed legal environment was further altered by new Securities and Exchange Commission (SEC) regulations and interpretations. Additional state legislatures, prodded by corporate managements and state business associations, reacted by passing their own "investor disclosure" and "takeover" laws.[6] Meanwhile, the financial community and experienced counsel and consultants, alert to the slightest impact of each new development, were countering each change with revised strategies and tactics.

This rapid evolution resulted, the authors report, in many requests that their treatise be brought up to date.[7] They have obliged, stating that contending with the constant stream of developments is similar to "grappling with a greased wrestler."[8]

Since publication of this second volume, many more significant developments have occurred which must be factored into any current discussion of the tender offer scene. This should not be taken as any indication that the authors' efforts have been in vain. What they have succeeded in doing is to maintain a headlock on each of the major issues sufficiently well to enable better evaluation of the latest developments. I suspect that the authors realized that they would never pin their greased adversary for the final count. They, more than most, are aware that this area is one of constant change.

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3. Preface, p. vi.
4. *Id.*
5. The Williams Act is the popular name of the 1968 amendments to the Securities Exchange Act of 1934 designed to regulate tender offers. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 (amending 15 U.S.C. §§ 78m-78n (1964)) (codified at 15 U.S.C. § 78m(d)-(e), § 78n(d)-(f) (Supp. V 1965-1969)), *as amended by* 15 U.S.C. §§ 78m(d)-(e) (1970).
6. By May 31, 1977, thirty states had adopted statutes regulating tender offers. Preface, p. vi.
7. *Id.*
8. *Id.* p. vii.

For instance, one may ask where all the multipage tender offer ads have gone. By no means should their disappearance be accepted as proof that the number of tender offers has lessened. Indeed, statistics show that use of the tender offer as an acquisition vehicle has been reaching new highs. The major cause of the demise of multipage ads has been a change in tactics as a result of new state takeover laws.

The prenotification provisions and hearing requirements of these laws[9] have effectively eliminated the "blitzkreig" or "Saturday Night Special" tender offer, which is permitted, even encouraged, by the Williams Act. Lengthening the period before an offer can become effective under the state laws has had several important and beneficial effects.[10] Elimination of the short-fuse offer has allowed management time to prepare and communicate its recommendations to shareholders. Even more importantly, the additional time has removed the undue pressure on shareholders to make hasty investment decisions. When state takeover laws are in effect, shareholders have time to make considered judgments whether to tender or sell their shares[11] or remain a shareholder.

More significantly, the delaying effect of these laws has encouraged development of a true auction market for target company shares. In the past, even in the face of a Saturday Night Special offer, target companies were able to find alternate suitors ("for better or worse"), either as volunteers or as hasty recruits by the target company's investment banker. However, the universe of potential bidders under such circumstances was always severely restricted. More conservative and cautious managements considered it questionable business judgment to invest millions on the basis of a quick investigation of the target company, conducted in a highly-charged, competitive atmosphere.

As a consequence, premiums paid for target companies have escalated, with premiums of 100% over market being commonplace. Under such circumstances, if his initial price is not suffi-

9. For an excellent presentation, in chart form, of the essential elements of the various state laws and regulations, see pp. 234-45.

10. This is, of course, heresy insofar as the Securities and Exchange Commission (SEC) is concerned. *See* SEC Brief, *reprinted in* SPECIAL REPORT: THE SEC SPEAKS IN 1978 (Practising Law Institute Mar. 1978).

11. A sale has, of course, the same end result as a tender since the purchaser will be a professional arbitrageur (or, in today's speculative market, a less sophisticated speculator) who purchases solely for the purpose of tendering. The arbitrageur assumes the risk of the tender offer being enjoined or withdrawn.

ciently high to be preemptive, the offeror is faced with acquiring the target at a cost greater than he had hoped or leaving the field of combat in defeat, with the White Knight riding off with the prize. In either event, the target company has "lost" the battle. The consolation is that shareholders obtain a better price because of the expanded auction market created by the delay.

This reviewer is familiar with at least one auction for a target company which was removed by its imaginative investment banker from the street to panelled executive offices, thus avoiding the unseemly sight of a full-pitched, public battle for the target prize and assuring the conduct of the auction under more controlled conditions. Thus, the last stage of the battle was waged in a more civilized atmosphere if not in a more civilized manner. And, at least in this case, it was the managements of the competing offerors who found themselves in the pressure cooker, a spot normally reserved for the shareholders of the target company.[12]

The built-in delay of the state takeover laws denies the offeror the advantages of speed and pressure inherent in the Saturday Night Special tender offer. Consequently, other tactics have been developed. There is the "bear hug" approach in which the target company is informed of an intention to make a tender offer and requested to meet to discuss management's approval or at least management's consent to present the offer to the shareholders without opposition. The offeror concurrently issues a public announcement of his proposal; or, he files a notice of intention to make an offer under applicable state law; or, he advises the exchange upon which the target shares are listed of his proposal, expecting the exchange to suspend trading, thereby forcing the target to make the announcement. These approaches are usually accompanied by repeated references to the fiduciary obligation of the target director to consider (*i.e.*, accept) the offer. As days pass, even a few arbitrageurs may join the chorus if management seems inclined to want to keep the company independent. If the bear hug approach is successful, the result is often a negotiated deal, with perhaps a slight increase in the premium to prove the target management's negotiating ability and the offeror's magnanimity. On the

12. In a few instances, the offeror has, in the face of a statement of opposition by the target company's management, announced a reduction in its offering price on the theory that the offeror will be faced with additional expenses in view of management's opposition. In at least one instance, the offer was initially presented on a two-price basis, the higher price was dependent on management's cooperation.

other hand, the target company may use the time afforded by the state law to find a White Knight willing to pay a higher price.

The bear hug tactic has led to another new and interesting breed of offerors—the opportunists. They make their bear hug offer to the target management, relying on the implicit threat of an "unfriendly" tender offer and on the spectre of shareholder suit, a fear which influences far too many directors.[13] Their hope is to initiate merger negotiations which under other circumstances the target might reject. If the opportunist-offeror unexpectedly finds that he has misjudged the target and meets a resounding refusal, he walks away from his offer, perhaps with expressions of hurt innocence, denying he ever had any intention to go the unfriendly route.

This extended auction market has changed tactics in another way. Preoffer purchases were the rule in the early days of tender offers when the section 13(d) reporting standard was ten percent. This practice fell into disuse when the standard was dropped to five percent[14] and the Saturday Night Special, which calls for maximum preoffer security, evolved. Offerors now hedge their bets. By taking a position, they not only show their intent to proceed with the takeover attempt, but more importantly, they stand to profit in the event a third party makes an offer which the original offeror is not willing to better.

More recent developments indicate that these changes in tactics may lead to a major change in the law of tender offers. The much debated subjects of the definition of tender offer and the companion "creeping tender" theory have somewhat unexpectedly, but not without justification, become the latest *cause celebre* on the tender offer scene. Fortunately, the authors have given this matter considerable attention.[15] Their discussion and analysis of applicable

13. All too often directors are so fearful of being sued that their decision is less based on their best business judgment and the best interests of the shareholders than on the possibility of personal liability. Those directors who base their decision on such a possibility are, in fact, breaching their fiduciary obligation to the shareholders. Individuals with such a degree of timidity should not serve as directors.

14. *See* Act of Aug. 18, 1970, Pub. L. No. 91-567, § 5, 84 Stat. 1497 (amending 15 U.S.C. § 78m(d) (Supp. V 1969)) (dropping reporting standard from 10% to 5%).

15. *See* pp. 1-34 (definition of term "tender offer"). The "creeping tender offer" is related to the definition of a tender offer. The classic creeping tender offer involves the secret purchase of shares up to the point at which public disclosure is required by the filing of a Schedule 13D. This schedule must be filed and sent to the issuer within 10 days after the five percent level of ownership is reached. It is, therefore, possible to acquire more than five percent before public disclosure is required (although it can be argued that notice of the purchase of the first share in excess of five percent must be filed "promptly"). The foothold purchase is im-

laws, rules, and cases will serve as valuable background for those who follow the renewed debate.

Over the years there has been a diehard group which believes that rapid accumulation of shares, accomplished through purchases other than under the traditional, formal tender offer, should be subjected to the same substantive and procedural rules as those adopted under the Williams Act. This group believes that *Cattlemen's Investment Co. v. Fears*[16] and the SEC release on "special bids" on the floor of the Exchanges,[17] opened the door to a broader definition of tender offer. To date the group has received little support. The courts generally have taken a more conservative approach. Until very recently, the SEC has likewise shown little inclination to press for a more expansive definition. When revised tender offer rules were proposed, the Commission specifically declined to define the term, although the Commission carefully protected its flexibility.[18]

A thundering announcement that "Sharpshooters of the world,

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mediately followed by a formal tender offer. This pattern was followed by Gulf & Western in its unsuccessful attempt to take over A & P; this attempt was unsuccessful because the court found a violation of the federal antitrust laws, not because of any violation of the federal securities laws. The approach generally taken to avoid the integration of the earlier purchases into the subsequent formal tender offer is to allow a lapse of time between the last purchase and the making of the offer. Preoffer purchases often raise problems in responding to the "purpose of transaction" item called for by Schedule 13D. Careful draftsmen fall back on boilerplate language to the effect that the acquirer's "present intention" is to hold the shares for "investment." His ultimate decision, the boilerplate states, will be determined upon the basis of developing facts and information, and careful review and evaluation of the investment. There then follows a long list of options, one of which, of course, is the possibility of a future tender offer. Present intention is a difficult fortress to attack, particularly if the acquirer is able to deprive all participants in the planning of any access to pens, pencils, typewriters, dictating machines, and secretaries and if, as a final precaution, he has established a short records retention program. The SEC regularly protests the use of boilerplate language. These pronouncements are then usually followed by the appearance of new and better boilerplate. There is perhaps one approach which the SEC should consider: the adoption of a rule which would create an irrebuttable presumption that an investment purpose statement constitutes a fraudulent, deceptive, or manipulative practice in the event the filer makes a tender offer within six months of such statement. Rule 16b, 17 C.F.R. § 240.16b (1977), might be looked to for precedent.

16. 343 F. Supp. 1248 (W.D. Okla. 1972), *vacated per stipulation*, Civ. No. 72-152 (W.D. Okla., May 8, 1972).

17. Exchange Act Release No. 8392 (Aug. 30, 1968), *reprinted in* [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,715, at 83,637-39.

18. Securities Act Release No. 5731, Exchange Act Release No. 12676 (Aug. 2, 1976), *reprinted in* [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,659, at 86,695-96.

take care,"[19] delivered by the head of the SEC's Enforcement Division to a ballroom full of securities lawyers, presaged the recently filed SEC complaint against Sun Company, Inc., its subsidiary, LHIW, Inc. ("Let's Hope It Works"), its investment advisors, and others.[20] The suit involves the purchase of thirty-four percent of the outstanding stock of Becton Dickinson & Company from members of the Dickinson family and twenty-five institutional holders of stock at a substantial premium over market. The SEC's complaint is fascinating reading, not only for the particular legal problem it presents, but, far more interestingly, as an example of how the financial community operates in the highly-charged corporate takeover atmosphere. Selected institutions, known holders of blocks of stock, were carefully canvassed weeks in advance as to their ability to act promptly on an offer for stock. The institutions were advised that the impending offer would apply only to shares held in discretionary accounts, as there would not be time to contact the various fiduciaries, investment advisors, or beneficial owners who would be required to make the investment decision to sell. The name of neither party to the possible transaction was divulged at that time. The timing of the offer was carefully orchestrated. The actual solicitation effort was completed in a couple of days, initiated by carefully timed, simultaneous telephone calls to the institutions; the calls were placed immediately prior to the closing of the market and the terms of the offer were disclosed immediately after closing. Moreover, the New York Stock Exchange was persuaded to stop trading. Most of the institutions jumped at the opportunity to sell their holdings. There was, however, at least one bank which refused to participate in the proposed limited offer on grounds that it was, in the words of the complaint, "against the firm's policy to participate in a transaction of that type because, in [the bank's] view, the premium should be offered to all shareholders."[21]

The outcome of the SEC's case will not be known for some time. In addition there are private litigations based on similar allegations. Those who are advising clients on purchases of stock in potential target companies will have to follow this case carefully.

19. Comments of Stanley Sporkin, Director of the Enforcement Division of the SEC, PLI Conference (Mar. 3-4, 1978), *quoted in* SPECIAL REPORT: THE SEC SPEAKS IN 1978, at 8 (Practising Law Institute 1978).

20. SEC v. Sun Co., Civ. No. 78-1055 (S.D.N.Y., filed Mar. 9, 1978).

21. Complaint at 11.

Meanwhile, they would be well advised to recommend a more cautious approach to such purchases in view of the implications of the SEC suit.

Of course, it is a long step from the filing of a complaint to a court order declaring the purchases a violation of the Williams Act. The SEC has, however, chosen its case well. The case graphically illustrates the degree of corporate control which can be rapidly obtained through a meticulously organized plan to purchase blocks of stock from selected holders, particularly from holders known to be performance-oriented and from holders who can be expected to react favorably to almost any premium over market. The market impact of such rapid and selective purchases can be as great as that of formal tender offers. At the same time, the selectivity of this approach makes it particularly vulnerable to attack due to its denial of an equal opportunity for all shareholders to participate.

One does not require a shareholders list to be successful in acquiring control of a company whose stock is relatively widely held and traded.[22] Information concerning institutional holdings is readily available to professionals. In the Becton Dickinson case,[23] one source of information was the computerized records of the investment bankers. However, such a sophisticated system is not essential. There are services published by organizations such as Vickers and Best which list the reported holdings of mutual funds, bank trust departments, colleges, and insurance companies. Moreover, absent such listings, substantial quantities of stock can be located by blind contacts with the major banks and brokers.

We can expect additional important developments in the matter of preoffer purchases both through additional SEC action and private litigation in contested offers. This will lead to further changes in tactics. While in all probability it will not result in the elimination of the preoffer purchases, it will call for a more restrained approach. It seems unlikely at this time that true market purchases, for example, purchases through a broker on the floor of an exchange, will be successfully attacked.[24]

22. An analysis of companies which have successfully warded off tender offers and remained independent indicates that a major element of success is a "territorial imperative" attitude on the part of the shareholders. This may arise from a geographic concentration of shareholders in the vicinity of the target company's operations, a xenophobic attitude, or a unique shareholder body consisting largely of loyal customers.

23. SEC v. Sun Co., Civ. No. 78-1055 (S.D.N.Y., filed Mar. 9, 1978); *See* text accompanying notes 20 & 21 *supra*.

24. On the other hand, what if the floor trader of a brokerage firm handling the

The marketplace, the Williams Act and the rules adopted thereunder, and the general attitude of the SEC in today's market are so weighted against target companies that these companies' options have become seriously limited.[25] Any company which has a substantial number of shares held in "street" name is vulnerable to a takeover by a cash offer.[26] High market value does give considerable assurance to the managements of such companies as IBM and General Motors. On the other hand, many managers who once thought their companies insulated from any takeover attempt have been considerably shaken by the size of the Babcock & Wilcox and Carborundum takeovers. It is a fact that many companies are in a position to commit substantial cash, both internally generated or readily available from their friendly lending institutions, to make tender offers. Moreover, any company must consider the possibility of a two-step cash and paper acquisition. If the target's cash is high and its debt is low, the financing of the takeover may ultimately be supplied by the target company itself. Large management or family holdings also tend to deter takeover attempts. Again, however, if the street holdings are large, control may still be wrested from them. Stock held by investors in the names of their brokers is largely trading or speculative stock. These owners are short-term investors with no basic loyalty to the company in which they have invested. Institutions likewise tend to be short-term rather than long-term investors. They will normally jump at the opportunity to obtain a premium over market, if not because of a fiduciary obligation to their clients or beneficiaries, then to improve their investment record.

Litigation is the most common and effective tactic available to target companies which have determined that an offer is unsatisfactory. Occasionally, their case is strong enough to defeat the of-

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buy transaction stands at the specialist's post buying everything that becomes available? Would not these purchases immediately come to the attention of the other floor traders, and if the price were right, would not the floor traders promptly inform their offices of this development; might not the word thereafter be disseminated to the registered representatives around the country, suggesting that their clients might want to take advantage of this unexpected opportunity?

25. This conclusion is supported by the limited number of companies which have been able to remain independent after being confronted with a tender offer proposal.

26. While arbitrage activity essentially converts an exchange or paper offer into a cash offer, there are other factors which make such offers more difficult for the offeror. In addition, such offers are more easily defeated by a competing offer from a White Knight, which can probably be completed before the exchange offer can become effective.

feror's attempt to acquire control. The most effective suits have been those based on strong antitrust arguments. In most cases, the major significance of litigation brought by the target company has been to buy additional time for the investment banker to find a White Knight. Of course, only the investment banker who arranged the deal—for a multidigit fee—considers this a victory for the target company. He can rightly claim that the original offeror has been defeated, but it does not automatically follow that the target company has won, since it will no longer have its independence. In some instances, the White Knight may also eventually be a loser if its hasty and pressured investigation has failed to turn up hidden negative factors.

Potential target companies have their own tactics.[27] While successful tactics are becoming increasingly scarce, there are at least three to which a potential target company should give serious consideration.

For the long term, a potential target company should initiate a well-planned investor and shareholder relations program[28] with the specific goals of obtaining new long-term investors and building on the inherent loyalty of the existing shareholders. Long-term investors, by and large, are those who register the stock in their own names, physically holding the certificates in their safe deposit boxes, if not under the traditional mattress. Unfortunately, the long-term individual investor is fast becoming an endangered species. Statistically, the individual investor, both long- and short-term, has been abandoning the stock market at an alarming rate over the last decade. An overwhelming percentage of daily trading is institutional. While the task is not easy, there are still some opportunities to attract new long-term investors, largely through regional programs.

The existing shareholders, all too long ignored by management, must be given special attention. Improvement in shareholder communications is fundamental. The key words in this regard are honesty, clarity, and brevity. Management can never afford to lose credibility with its shareholders. It must present its story clearly and succinctly and in formats which encourage readership.

27. Many of these tactics are referred to in this book, pp. 193-98, and in the earlier volume, E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 219-76 (1973). *See generally* Note, Chris-Craft: *Changing Perspectives on Contests for Corporate Control*, 6 HOFSTRA L. REV. 203, 221 n.128 (1977).

28. In fact, all companies should initiate such programs as a matter of good shareholder relations.

The individual investor has given his vote of confidence to the company and its management by both his initial investment and by continuing to hold the stock.[29] Every effort should be made to reinforce that confidence. One such means is to offer a dividend reinvestment plan, sweetened with a supplemental cash feature and the assumption by the company of all expenses. Participation in such a plan is convincing evidence of a reaffirmation of the shareholder's initial vote of confidence.

Reincorporation in a state which has adopted a takeover statute should likewise be considered. A decision to change the corporate domicile should not, of course, be lightly made. There may be overriding factors which would make such a move undesirable despite any advantages which might be available from a takeover statute. Moreover, the decision should not be made with the expectation that such a law will afford absolute protection against all takeover attempts. While once looked upon as a reason to find an alternate and more vulnerable target, potential offerors have increasingly been willing to make offers despite the application of such laws. The statutes have been severely criticized[30] and one such law, adopted by Idaho, has recently been declared unconstitutional by the Fifth Circuit Court of Appeals.[31] However, while such laws may not deter or defeat offers, they will at least have the beneficial effect of eliminating Saturday Night Specials, thereby affording the board of directors, the management, and the shareholders an opportunity to reach their decisions under less frenetic conditions.

A third tactic which should be considered is the adoption of appropriate amendments to the corporate charter. Again, too much reliance should not be placed on the effectiveness of most of the current, fashionable amendments. Indeed, it is this writer's opinion that the SEC is causing many proxy statements to be "false and misleading" by its insistence that management include repetitive statements that their purpose or possible effect may be to "entrench" management. One has only to review the number of companies with "shark repellent" charter provisions which have

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29. Activists and those on the SEC staff who cannot understand why shareholders do not cast more votes against management at annual meetings seem to have considerable difficulty in grasping this fact.

30. *See* pp. 207-33.

31. Great W. United Corp. v. Kidwell, [1978] 466 SEC. REG. & L. REP. (BNA) E-1 (5th Cir. Aug. 10, 1978) (court also found state takeover law preempted by Williams Act because state and federal statutes conflicted).

been taken over by an offeror or a White Knight to be convinced that these amendments are not as effective as claimed. For instance, the staggered board has afforded no real protection against cash tender offers. The record has been that outside directors resign almost immediately after control changes and the inside directors' continuance depends on whether they have been retained or fired by the new owners.

This criticism does not mean that management should not review the laundry list of possible amendments to determine which, if any, are appropriate for its company. There are at least three approaches which should be given particular consideration; it is significant that the overtones of each are primarily shareholder-interest oriented.

A common charter amendment is one which requires a high or special voting standard to effect a merger or similar transaction with a company which has acquired a certain percentage of the target company's stock prior to presentation of the merger proposal to the shareholders. Historically, the specified vote has been a supermajority of seventy-five to eighty percent. The SEC's proposed going-private rules[32] have given impetus to a substitute standard: a majority (sometimes expanded to a higher level) of the outstanding stock other than the stock held by the acquiring company. One company has been generous enough to also eliminate from "independent" stock the holdings of management.

A somewhat related charter amendment is the so-called "fair price" or "squeeze out price formula."[33] This type of provision has little direct effect on the tender offer itself. It comes into play only after the tender offer has been completed, when the acquiring company attempts to eliminate the remaining shareholders, both those who opted not to tender or sell, and those who for a variety of reasons may not have known a tender offer even had been made. The required minimum price may be determined by several different formulae, the most common being the highest price paid by the acquiring company for any stock which it has purchased. Any benefit to the target's management is essentially secondary. The primary effect of this provision is to discourage offerors who are willing to pay an excessive cash price for sufficient shares to

32. Securities Act Release No. 5884, Exchange Act Release No. 14185 (Nov. 17, 1977), *reprinted in* [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,366, at 88,375.

33. *See* p. 196.

obtain immediate control and then later to squeeze out those remaining at a lower price, perhaps with paper. Moreover, the assurance of a minimum price in any eventual squeeze-out lessens the pressure on shareholders to accept the tender in fear of being left at the mercy of the offeror.

A third charter amendment which should be considered is the unique provision presented this year to its shareholders by Control Data Corporation. The provision constitutes a direction by the shareholders to the board of directors to consider factors in addition to price in reaching its recommendation as to any tender offer which may be made. The uniqueness of the amendment warrants direct quotation:

> The Board of Directors of the Corporation, when evaluating any offer of another party to (a) make a tender or exchange offer for any equity security of the Corporation, (b) merge or consolidate the Corporation with another corporation, or (c) purchase or otherwise acquire all or substantially all of the properties and assets of the Corporation, shall, in connection with the exercise of its judgment in determining what is in the best interests of the Corporation and its stockholders, give due consideration to all relevant factors, including without limitation the social and economic effects on the employees, customers, suppliers and other constituents of the Corporation and its subsidiaries and on the communities in which the Corporation and its subsidiaries operate or are located.[34]

There is substantial logic behind such an amendment. For instance, in recent years corporations have been subjected to growing demands that they exercise greater corporate responsibility. At least one pertinent example is the expanding utilization of rule 14(a)-8[35] by special interest groups eager to press their social programs upon corporations. Here is clear precedent for corporate management to look beyond the immediate marketplace in reaching its decision to recommend for or against acceptance of a tender offer. It is entirely logical that management should take into account its special reponsibilities to employees, to the communities in which the corporation operates, and to its customers.

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34. Proposed Amendment to Article Ten of Certificate of Incorporation, in Control Data Corporation, Notice of Annual Meeting of Stockholders to be held May 3, 1978, at 5 (Mar. 20, 1978).

35. 17 C.F.R. § 240.14a-8 (1977).

nizes that the tender offer scene is dynamic and ever-changing. It does not pretend to be the last word, for that may never come.

Indeed, one can even hear the early stirrings of doubt as to the desirability of the unnegotiated tender offer as business practice. In reality, the tender offer is less a means to change control than a convenient way to acquire assets quickly and cheaply, particularly in the current, seriously depressed market. Tender offers are now considered by many to be counterproductive to the nation's economic requirements. Cash reserves which could be invested in new plants, new equipment, and new products with resulting benefits to the overall economy and employment picture are being diverted to takeovers of existing, and inevitably aging, operations for the primary reason that the offeror's management can assure its corporate growth with less risk and with more confidence of obtaining a prompt and satisfactory return on investment.

These are now just stirrings. Such concerns will grow, however, and may have a more dramatic effect on the corporate takeover scene than the continuing change in tactics we have seen over the years.