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CASH TENDER OFFERS FOR SHARES— A REPLY TO CHAIRMAN COHEN*

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In the past few years, the corporate takeover device of the cash tender offer has grown in frequency, and thus in importance. Concomitantly, legislation designed to sweep this relatively unregulated method of acquiring corporate control into the ambit of the SEC has been proffered. In response to the reasons which have been propounded in favor of such regulation, the author analyzes the pending legislation, appraises its likely consequences, and evaluates its objectives.

OF THE various methods available for taking over control of a corporation,¹ the cash tender offer for corporate shares is the least regulated. A brief look at the alternative methods will show why. An exchange for shares in a different corporation entails a sale of those shares within the meaning of the Securities Act of 1933² and is therefore subject to all the disclosure requirements of that act. A merger (and this would generally be true of share exchanges as well)

* This article represents a reply to the views expressed by Manuel F. Cohen, Chairman of the Securities and Exchange Commission, in *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAW. 149 (1966). The present article is an elaboration of the author's commentary, *Tender Offers and Free Markets*, 2 MERGERS & ACQUISITIONS 91 (1966), which also contains a speech by Chairman Cohen expressing substantially the same views as the article cited *supra*. Cohen, *Takeover Bids*, 2 MERGERS & ACQUISITIONS 87 (1966). This present article does not deal with the matter of corporate purchases of stock discussed by Chairman Cohen.

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¹ These methods are described, compared, and analyzed in Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965); Manne, *Some Theoretical Aspects of Share Voting*, 64 COLUM. L. REV. 1427 (1964).

² § 2 (3), 48 Stat. 74 (1933), as amended, 15 U.S.C. § 77b (3) (1964). See LOSS, SECURITIES REGULATION 513 (2d ed. 1961). The act covers "offers to sell" as well as "sales."

is subject to the various antitrust laws and a variety of constraints resulting from the Internal Revenue Code. Proxy fights are heavily regulated by the SEC's proxy rules promulgated under Section 14 (b) of the Securities Exchange Act of 1934.³ However, heretofore only a small and minor body of case law has occasionally been applicable to cash transactions for a controlling block of shares.⁴ Now, therefore, come Congress and the SEC to set the matter straight. This freak survivor of that dangerous, prehistoric era of unregulated free markets must not be tolerated.

Bills have been submitted in the current session of Congress⁵ to

³ 48 Stat. 895 (1934), as amended, 15 U.S.C. § 78n (1964).

⁴ The cases are collected and discussed in the following articles: Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 HARV. L. REV. 505 (1965); Hill, *The Sale of Controlling Shares*, 70 HARV. L. REV. 986 (1957); Jennings, *Trading in Corporate Control*, 44 CALIF. L. REV. 1 (1956).

⁵ The bill, submitted by Senator Harrison Williams, would amend the Securities Act of 1934 and reads in pertinent part as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 13 of the Securities Exchange Act of 1934 is amended by adding at the end thereof a new subsection as follows:

"(1) Every person, who by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly acquires or obtains the right to acquire the beneficial ownership of, or increases or obtains the right to increase his beneficial ownership to, more than 10 per centum of any class of any equity security which is registered pursuant to section 12 of this title shall, within seven days after such acquisition, or the obtaining of such right to acquire, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement as herein below described.

"(A) Each such statement shall contain such of the information specified in subsections (i)-(v) of this section, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors.

"(i) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected,

"(ii) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank as defined in section 3 (a) (6) hereof it will be sufficient to so state,

"(iii) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to, or merge it with any other persons, or to make any other major change in its business or corporate structure,

"(iv) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (a) such person, and (b) by each associate (as defined in the rules and regulations of the Commission under this Act) of such person, giving the name and address of each such associate, and

"(v) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

....
 "(4) The provisions of this subsection and of section 2 of this bill shall not apply in respect of—

....
 "(B) Any acquisition or proposed acquisition of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of the outstanding securities of that class at the time of the acquisition. As used herein the term "outstanding securities" of a class shall not include securities of the class held by or for the account of the issuer.

....
 "(5) It shall be unlawful for any issuer, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or in order to prevent such acts and practices as are fraudulent, deceptive or manipulative, to purchase any equity security which it has issued. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

"SEC. 2. That section 14 of the Securities Exchange Act of 1934 is amended by adding at the end thereof new subsections as follows:

....
 "(2) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title which, if consummated, would result in such person owning beneficially more than 10 per centum of such security, unless five days prior to the making of such tender offer or request or invitation for tenders, such person has filed with the Commission a statement containing such of the information specified in paragraphs (A) and (B) of subsection 1, section 1 of this bill, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Preliminary copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors and shall be filed with the Commission at least two days prior to the date copies of such material are first sent or given to security holders.

....
 "(3) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance

regulate cash tender offers, provide for the disclosure of considerable amounts of information by offerors, and give the Securities and Exchange Commission considerable rule-making authority in the area. In a recent article, Manuel Cohen, Chairman of the SEC, defended the major thrust of this legislation⁶ and explained the Commission's reasons for advancing it. One would have expected the Chairman to offer some fairly cogent reasons for wanting to add this regulatory responsibility to those of an agency generally alleged to be overburdened already. And one would have expected these reasons to be bolstered by empirical evidence and hard statistical data. But, alas, as with so many areas of policy-making by the SEC,⁷ this is not what we receive.

Chairman Cohen's principal defense rests on an argument that seems completely to beg the question. He states, on several occasions, that a cash offer for shares should be covered by the Securities Act of 1933, since tender offers involving an exchange of shares are

with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

"(4) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation except as the Commission may otherwise prescribe by rules, regulations or order as necessary or appropriate in the public interest or for the protection of investors.

"(5) Where any person makes a tender offer, a request or invitation for tenders for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor.

"(6) Where any person varies the terms of a tender offer, or request or invitation for tenders before the expiration thereof by increasing the considerations offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

....
S. 510, 90th Cong., 1st Sess. (1967). The bill is reprinted in 113 CONG. REC. S. 445 (daily ed. Jan. 18, 1967). See *id.* at S. 443 (remarks of Senator Williams introducing legislation); *id.* at S. 446 (remarks of Senator Kuchel, co-sponsor).

⁶ Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAW. 149 (1966). Actually, Chairman Cohen was discussing S. 2731 and H.R. 14416, introduced by Senator Williams and Representative Staggers in the 89th Congress, 1st Session, on which hearings were never held. The new bill is consistent with the position of the SEC as indicated in Chairman Cohen's article, with one exception indicated in note 48 *infra*.

⁷ Cf. MANNE, *INSIDER TRADING AND THE STOCK MARKET* 10-15 (1966).

covered and the choice confronting shareholders is not fundamentally different in the two cases.⁸ But does the *existence* of one form of regulation really tell us anything about the need or desirability of another? If the regulation of cash tender offers is desirable, it must be for reasons other than that share exchange offers are regulated.

But even if mere analogy were a valid kind of argument, the two types of offers do not really seem to be parallel. Chairman Cohen ignores the fact that share exchanges as a method of taking over corporate control were never considered by Congress in adopting the Securities Act of 1933.⁹ Quite clearly, Congress was concerned with new public issues of securities, since it felt that the greatest misdeeds in the stock market involved public issues of securities with which the public had no experience. In 1941 the SEC tried, unsuccessfully, to broaden the coverage of the 1933 Act by adding the words "or purchase" after the word "sale" in section 17a, which deals with fraud and deceptive devices.¹⁰ However, Congress stuck with the "sales only" philosophy of the Securities Act. Thus, it is purely fortuitous or coincidental that the '33 Act can be used to regulate a form of control takeover at all. Chairman Cohen must look elsewhere than to existing schemes of regulation to find a justification for regulating cash tender offers.

In reality, the entire matter of tender offers is far more complicated than Chairman Cohen has acknowledged. Again, as in 1933 and subsequently, a highly simplistic notion of "disclosure" is considered to be the panacea for all corporate ills. It is high time that this notion was re-examined and subjected to careful study.¹¹ Reliance on disclosure as a basis for formulating corporate regulatory policy can lead to unexpected and unhappy results. Careful and realistic analysis, not slogans and guesses, are needed to avoid potentially damaging policies. The purpose of this article is first to explain what issues are really involved in the matter of takeovers and then to examine the provisions of the proposed legislation and Chairman

⁸ Cohen, *supra* note 6, at 149, 151 (twice), 152, 156.

⁹ *Hearings on S. 875 Before the Senate Committee on Banking and Currency*, 73d Cong., 1st Sess. (1933); *Hearings on H.R. 4314 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 1st Sess. (1933). See Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959).

¹⁰ See Loss, *op. cit. supra* note 2, at 1426.

¹¹ See Manne, *What's So Bad About Insider Trading?*, *Challenge*, Jan.-Feb. 1967, p. 14.

Cohen's defense of them. Finally, some proposals will be advanced for improving the lot of noncontrolling shareholders in the market for corporate control.

BACKGROUND THEORY

The subject of tender offers certainly raises some of the most fascinating issues in the securities field. Aspects of two important market phenomena must be understood before one can deal intelligently with tender offers. First, it must be recognized that, for analytical purposes, control of a corporation must be treated as any economic good for which men compete in the market place. Secondly, it must be remembered that information is a valuable commodity, not a free good, and it too is the subject of a market.

Briefly, the market for corporate control in our system operates in the following manner:¹² if an existing corporation with publicly traded shares is poorly managed,¹³ holders of those shares will respond by selling. This will drive the price down to the point indicated by the quality of management which the corporation is receiving. As the price of securities of any corporation is thought to be low relative to the price that would be generated by more efficient managers, the stage is set for the critical functioning of the market for corporate control. Outsiders, whether we call them "raiders" or more polite names, will respond to the opportunity to make substantial capital gains (not necessarily in the tax sense) by buying control, managing the company efficiently, and then perhaps disposing of the shares. It is not necessary that they remain permanently to manage the business.¹⁴

¹² See articles cited note 1 *supra*; Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399 (1962).

¹³ In this context "poorly managed" refers to any management policy or decision which causes a lower stock price than any feasible alternative policy or decision would generate.

¹⁴ Unfortunately anyone who regularly buys control of corporations and does not remain to manage the business has been tagged with the opprobrious label, "liquidator." The word certainly has an ominous tone to it. After all, none of us wants to be liquidated. But the professional liquidator, if such exists, cannot be "all bad." Unless these individuals are performing the valuable function suggested in the text, it will be impossible for them to succeed on any continuing basis. If they are liquidating businesses that would be more profitably operated by someone else, their presence in the market for company shares would cause a *decline* rather than a rise. This, of course, would be self-defeating. Therefore, their continued presence must be taken as some evidence that they are performing a socially or economically useful function. Unhappily, it is difficult to think of a mellifluous word with a happy connotation for

The critical thing—perhaps basic to the entire American system of corporate capitalism—is the fantastic protection which noncontrolling shareholders receive as a result of the functioning of the corporate control market. For it is this market and only this market which in the long run guarantees the identity of interests between numerous small shareholders and managers who may own few or no shares at all.¹⁵ The very existence of potential competition for the positions of incumbent managers conditions them to think in terms of keeping stock prices as high as possible relative to other companies in the same industry. They do not have to understand the economics of the market for corporate control or how it conditions them. These pressures are present, and those who act contrary to them do not survive. This, of course, is precisely what we want from our system: efficiency, automaticity, and incentive to benefit the shareholders.

The interests of the American shareholder have obviously been superbly protected by the functioning of this market. No alternative theory even begins to explain the continued investment of billions and billions of dollars with almost completely insignificant losses resulting from malfunctioning in the system. The seeming exceptions, largely matters of criminal or fraudulent activity, occur throughout any system—free market or otherwise. But given the fantastic importance of a free, competitive market for control of corporations, we should be very careful about the methods chosen to deal with the few problems which may arise. Actually, traditional criminal law, perhaps with additional administrative enforcement aids, and civil suits have not proved inadequate to the task. Furthermore, it must be remembered that every interference with the competitive workings of this market, no matter how high the moral aspirations of the proponents, may do profound injury to numerous individuals investing in stocks.

This short and necessarily oversimplified description of the market for corporate control should not be taken as a measure of the complexity of the subject. The intellectual and theoretical work in this field is just beginning, and many practical aspects remain to be

what these unsung heroes do. Indeed the most accurate term might be "corporate garbagemen," since they clean up the messes left by the regular corporate householders. Anyone for "corporate redeemer?"

¹⁵ The significance of the corporate control market for both small shareholders and managers is the crucial point missed by Berle and Means in their celebrated and influential *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

worked out. Nevertheless, the existence and importance of this market would seem to be well established. It is perhaps not surprising that busy government officials cannot keep fully informed on the latest theoretical developments in their own fields, but it is unfortunate.

MARKET METHODS

The market for corporate control functions, as we have seen, in several different ways. The proxy fight is the best known of these, though for various reasons it is also the least used.¹⁶ The most important reason for its lack of popularity is that a proxy solicitation does not yield shares on which capital gains may be realized by the outsider. Since, as we have seen, this is perhaps the most important factor fueling the market for corporate control, one would not expect proxy fights to occur frequently.¹⁷ A proxy fight may still, in some circumstances, be financially the most feasible method of fighting for control. Much more attention needs to be given the question of the effect of the SEC's proxy solicitation rules on the cost of capturing control.¹⁸ Unfortunately, in this area naive ideas about shareholder democracy still color SEC statements and policies.

The most frequently used device for acquiring control is the merger. This device, however, is appropriately divisible into the cases in which control is held by one individual (or a group of individuals functioning as a unit) and those in which share ownership is widely diffused. The former case will be found on analysis to look quite similar to the third method of acquiring control, the direct purchase of sufficient shares. But when no strong control block of shares exists, our law has the effect of giving most of the market value of control to the corporate directors.¹⁹ In these cases, some form of side payment will generally be made to some or all the

¹⁶ See Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 114-15 (1965).

¹⁷ In the SEC's fiscal year 1964 only eighteen companies were reported as involved in proxy fights for election of directors. 30 SEC ANN. REP. 62 (1964).

¹⁸ It is particularly interesting that Chairman Cohen says that the SEC "in developing our approach to these bills . . . relied heavily on our experience with the proxy rules, and particularly proxy contests." Cohen, *supra* note 6, at 153. Again, Chairman Cohen seems to beg the question, since the mere existence of these proxy rules is no justification for an extension of that philosophy to another area. But more important, no research into and analysis of the effects of our existing proxy regulation has ever been made.

¹⁹ Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 117-18 (1965).

directors, which might, with a more effective method for stimulating competition for control, go to the shareholders.²⁰

The final method of taking over control is by direct purchase of sufficient voting shares to give the desired degree of control. The law does not allow a direct purchase of control positions as such,²¹ that is, seats on a board of directors may not be sold except as part of a transaction in which a control block of shares is transferred. However, direct acquisitions of control of a corporation may be made in one of several ways or in combination thereof: (1) the direct purchase from an individual of a controlling block of shares; (2) gradual acquisition of a controlling number of shares through anonymous open market transactions; (3) a tender offer to purchase shares at a stated price above the market; and (4) an offer of marketable securities in exchange for the required number of shares (basically a variant of number 3, used by corporations rather than individuals). Each of the various methods of taking over control has advantages and disadvantages over the others given a variety of circumstances, including the degree of diffusion of share ownership, the financial position of the control buyer, and numerous legal matters such as antitrust problems, tax considerations, and SEC regulations.

Before we can examine the matter of cash tender offers in detail, it is necessary to integrate some understanding of the market for valuable information²² as it affects tender offers. Information, like any economic good, is a scarce commodity. If we are to encourage its production, appropriate payoffs must be available as an incentive. Clearly, the market for corporate control relies heavily on the *production, not the wide dissemination*, of information about corporations. In the first instance, the potential control buyer must learn of the existence of a poorly managed corporation.²³ Not only must

²⁰ For some suggestions for improving the functioning of this market, see notes 33-35 *infra* and accompanying text.

²¹ *Essex Universal Corp. v. Yates*, 305 F.2d 572, 575 (2d Cir. 1962), and cases cited therein.

²² MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966), contains the first general discussion of the nature and importance of the market for valuable information in the corporate context.

²³ "Poorly managed" in the present context refers to the subjective judgment of the outsiders. The company in question may be well managed by objective standards, but the outsider may still believe that he can improve its affairs. Compare note 13 *supra*. One of the most instructive and perhaps best-known situations of the sort suggested involved Louis Wolfson's takeover in 1949 of the Capital Transit Company in Wash-

he know of the existence of the opportunity, he must also know with some degree of certitude the feasibility of his acquiring control, his ability to give the company improved management, the stock market's reflection of any improvement, and his ability to sell out at a profit.

It is doubtful that one performing this function will be strongly motivated by the opportunity to receive the incumbent managers' compensation. The corporate control buyer we are most concerned with is not by nature a bureaucratic manager. He is more likely to be willing to take great personal (not necessarily financial) risks for the possibility of reaping huge but uncertain rewards.²⁴ In the context of our discussion, the reward he is after is the difference between the cost of acquiring control of the relatively inefficiently run firm and the price he can recover for control of the resuscitated company or by liquidation. But this is largely a profit he can realize only if he is allowed to keep his own counsel. Public disclosure at any point in the whole takeover-improve-sell-out cycle may seriously diminish realizable profits and thus takeover incentives. The reason for this will become more apparent in the ensuing discussion. For now, however, it is important to notice that his takeover intentions

ington, D.C. This company had accumulated a tremendous amount of cash which was neither used nor immediately needed for operating purposes. In spite of this extraordinary cash position, the management maintained an exceedingly conservative dividend policy. Were this the only thing they were doing wrong, the conditions for a takeover would not have existed, since other shareholders, more interested in capital gains than dividends, could have been found. Shares would have moved to these hands, and the share price set by these contented shareholders would have discouraged a takeover. The company could not then be said to be poorly managed. Most observers have concluded that it was the dividend policy which caused the relatively low market price for shares, but another and more crucial factor was necessarily present. From 1941 to 1949, the company showed an unmistakable trend toward lower earnings, including a sizable deficit for 1947. It is quite possible that accounting procedures obscured even greater losses. But necessarily, if the market accurately reflected underlying reality, the shares were as low as they were, not because of dividend policy alone but because without a higher dividend or a change in management policies the *earned surplus of the company would eventually be used up in inefficient operations*. Under these circumstances, the only hope of the shareholders was to have someone offer them more than the prevailing market price for their shares. Wolfson was then in a position to make enormous profits by a liquidating dividend, perhaps his goal from the beginning. But if we begrudge him these profits, it will be the shareholders who will suffer most. If this mechanism had not been available, the shareholders could simply have rolled along with the company toward its eventual bankruptcy or reorganization. The facts from which this depiction is taken can be found in Senate Comm. on the Dist. of Columbia, *Public Transportation Serving the District of Columbia*, S. REP. No. 1274, 83d Cong., 2d Sess. (1954).

²⁴ Cf. the description of the "entrepreneur" in SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT* 128-56 (Opie transl. 1934).

and his business plans—information formulated by him—are most valuable to him if he is not forced to share this news with others.

CHAIRMAN COHEN'S ARGUMENTS

Now let us look at the arguments offered by the Chairman of the SEC in justifying detailed regulation of cash tender offers. Generally the Chairman believes that investors should be informed about one seeking control before they sell to him. We are told that "this is necessary if public investors are to stand on an equal footing with the acquiring person in assessing the future of the company and the value of its shares."²⁵ It is hard to conceive of a sentence which packs more misunderstanding of how markets in general function and in particular how the market for corporate control functions. Clearly, public investors should *not* be on an equal footing with individuals who have created *new* information and are performing a function which necessarily benefits everyone. If we put the completely passive shareholder on the same footing as this individual, the latter will have little incentive to take over control of a poorly run company and thereby protect noncontrolling shareholders from bad management. Moralistic aspirations for equality of wealth have nothing to do with rigorous analysis and clear understanding of the corporate field.

Chairman Cohen elaborates his information point with an example of a tender offer of six dollars for shares presently selling for five dollars and which can be made worth fifteen dollars on liquidation.²⁶ He states that "it is argued by some that the basic factor which influences shareholders to accept a tender offer is the adequacy of the price. But, I might ask, how can an investor evaluate the adequacy of the price if he cannot assess the possible impact of a change in control? Certainly without such information he cannot judge its adequacy by the current market price."²⁷ Here the Chairman seems to be playing with words, particularly the word "adequacy." The proposition which he is questioning is really that shareholders, like any economically rational human being, will compare alternatives in order to make economic decisions. Thus, if one option (selling shares at six dollars) is worth

²⁵ Cohen, *supra* note 6, at 150.

²⁶ *Id.* at 151.

²⁷ *Ibid.*

more than a second option (holding shares selling on the market for five dollars), then, *ceteris paribus*, it makes sense to take the first option (and to sell the shares). This is what is always involved in any shareholder decision, and it is in no way contradicted by the fact that they would rather have fifteen than six dollars. But that tells us absolutely nothing about whether we should require the outsider to disclose information about his plans for the business worth nine dollars per share. The argument Chairman Cohen is disputing is actually that shareholders would rather have six than five dollars, and that is strange indeed.

Let us consider the example used by Chairman Cohen. We should want to know first why the present management does not consider liquidating the company. Clearly that would seem at first glance, under the conditions posed, to be a part of their fiduciary obligation. However, we all know that there is no safe and simple way of giving an affirmative thrust to this notion.²⁸ Neither the SEC nor the shareholder's derivative suit can function satisfactorily in this context. Liquidation may in fact be disliked by the existing management group because they are protecting their own jobs at the expense of the shareholders, but they will always allege that it is their "business judgment" that the company should not be liquidated,

²⁸ Actually, one suggestion which might benefit shareholders is a statement of the liquidation value of the company filed along with normal financial reports. But this runs headlong into the SEC's firm holding that only historical cost can be carried in the company's published reports. Efforts to give this helpful additional information have been firmly rejected by the agency, *even under the proxy solicitation rules when the issue on which shareholders' proxies are being solicited is liquidation of the issuer*. See RAPPAPORT, SEC ACCOUNTING PRACTICE AND PROCEDURE 20.9-10 (2d ed. 1966). See also *id.* 3.9-11.

It is most ironic then that Chairman Cohen should state in connection with the hypothetical example referred to in the text: "Certainly the company's shareholders would want to know about liquidation plans. Indeed, it is the plan to liquidate which makes the bidder willing to pay more than \$5 per share. *Whether or not the company's liquidation value is generally known is not important*, for without someone to carry out the liquidation, this value is unobtainable . . ." Cohen, *supra* note 6, at 151. (Emphasis added.)

One certainly must wonder just what kind of disclosure rule Chairman Cohen has in mind. Is the outsider, unlike management, free, or required, to tell shareholders what the company is worth in liquidation? Is the value really unimportant if the shareholders merely know that someone thinks liquidation value is higher than present market value? Clearly it is not unimportant in any case, but it is probably *more* important to the shareholders for effectively dealing with the incumbents than it is for making a rational decision about the outsider's offer. As we have already seen, the outsider may provide the shareholders' best way out of a losing proposition.

and without some very special reason few courts would second-guess them on the point.²⁹

The market for corporate control, functioning through private decision-making, does provide a solution for this problem. But the incentives necessary to make this market function come from the very profits Chairman Cohen seeks to have shared with all shareholders. Like many share-the-wealth programs, Chairman Cohen's scheme ignores the problems of economic incentive. Unless someone performs this function, the noncontrolling shareholders will simply have to be content with their five-dollar shares. One can agree with Chairman Cohen that a ten-dollar gain is better than a one-dollar gain, but certainly we should take issue with the necessary implication of his logic that a one-dollar gain is not better than nothing. And there is no obvious middle ground.³⁰ Once we leave the workable ground of competitive prices, we are stuck in the morass of "fair" or "adequate" price, and other useless metaphysical notions. As yet no economist has figured a scientific way of giving content to those empty concepts. It is strange that a Commission dedicated to making capitalism function successfully would even try.

THE PROPOSED LEGISLATION

Disclosure of Identity

We can now take a detailed look at provisions of the bill regulating tender offers, which the SEC is supporting. First of all, it would require full disclosure of the names, business associates, and background of the offeror. The SEC's thinking on this point is fairly obvious though not expressly spelled out. Publicity is needed to disclose to the market the possibility of a takeover by very well-

²⁹ See *Israels, The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. CHI. L. REV. 778 (1952). The litigated cases have dealt almost exclusively with close corporations, though the problem of failure to liquidate may arise with large companies too. But, a fortiori, the courts will give more weight to "business judgment" arguments in companies with traded shares than in close corporations.

³⁰ This is not to say, however, that there are not feasible arrangements which would net prices between six and fifteen dollars. Clearly, if competition for control of the company develops, the shareholders will realize a higher price. However, if no competition develops, then we have no reliable way of knowing that the price should be different than that offered. What is needed here is an effective device for encouraging more outsiders to consider the takeover. Instead, Chairman Cohen's approach seems to go in the opposite direction.

qualified managers or a takeover by those who threaten disaster. This is probably not an important part of the bill, but it can be used to illustrate some of the more important problems which should be considered. First, who is being protected by this disclosure? Presumably, in the case of sales to "good guys," existing shareholders are being protected against selling the shares too cheaply. We have already discussed this point and noted the special advantages afforded shareholders by this group and the dangers which might flow from inhibiting their freedom.

In the case of sales to "bad guys," it would seem at first glance that shareholders are being protected against poor managers, but this cannot be true for those who sell their shares. Having sold at a price above the market, presumably they are satisfied with their transaction,³¹ and they may then be indifferent about the quality of management. The answer must be that this disclosure is in the interest of those shareholders who decide *not* to sell,³² because they did not know that crooks or poor managers were taking over their business. Nevertheless, no shareholder has a guarantee against a management change, and by not selling on the tender offer, these shareholders have demonstrated that they would prefer remaining with some new management. Thus it can be seen that this provision is not likely to protect buyers or sellers of shares adequately through the device of full disclosure. What it seems better designed for is to aid the SEC in spotting what they consider to be undesirables trying to take over corporations.

This brings us to one of the most basic points in this entire discussion: how much and what kind of protection can and should shareholders receive against crooks and inefficient managers? In the case of dishonest managers, the answer is fairly obvious. The public is entitled to all the protection that substantive and procedural criminal law afford—for crimes actually committed! We should remem-

³¹ Again it should be noted that the shareholders' only real cause for complaint would be that the present management took a side payment, in some form, for approving the control change. These side payments are probably most likely in merger situations, but they can occur with cash tender offers as well. See Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 117 (1965).

³² "A change in control can result in what amounts to a new, or at least vastly changed, company. A decision not to accept the offer amounts to a decision to buy into that new company." Cohen, *supra* note 6, at 152. Chairman Cohen does not, however, limit his defense to this argument.

ber that our criminal law system, unlike administrative proceedings, involves such basic protections as trial by jury, presumption of innocence, and no double jeopardy. These traditional safeguards against arbitrary government action should not be hastily sacrificed to the interests of zealous administrators, even though a few dishonest raiders may appear on the corporate scene. Certainly there have been very few, and traditional criminal law enforcement is not so inadequate as to require more radical preventive measures. We all may lose too much in the process of ferreting out a few bad operators.

Furthermore, even apart from the dangers of abuse of power by government officials, the present scheme is wrongly conceived. If the SEC's real concern is with potentially inefficient managers, then their solution should have been quite different. An unhampered and unregulated market for corporate control will be far more effective in gaining efficient management for shareholders than plans based on the idea of millions of unsophisticated shareholders making intelligent decisions about the relative qualities of opposing management groups, even those with criminal records.

Consideration should have been given instead to various proposals which would allow the market for corporate control to function more freely and more perfectly than it presently does. For instance, if more waiting time were required between director approval of mergers and submission for approval of shareholders, there would be more possibility of competing offers being generated.³³ And we have already noticed the desirable effects which might flow from announcements of liquidation values, though there are large problems in connection with this proposal. If shareholders were allowed to propose mergers or liquidations without prior approval of the board of directors, there would be less chance of the directors enjoying the entire value of the premium for control.³⁴ Finally, consideration might be given to a rule that would simply put the burden of proof on directors to show that they have explored all feasible alternative offers for control before settling on one and that the alternative

³³ See Manne, *Some Theoretical Aspects of Share Voting*, 64 COLUM. L. REV. 1427, 1438 (1964).

³⁴ See *ibid.* A somewhat related idea would be to make shareholder lists, with addresses and numbers of shares, more easily available than they are at present. Indeed, this single change might do more to liven competition in the market for corporate control than anything else.

selected was most in the shareholders' interest.³⁵ As things presently stand, directors have an extremely strong temptation to negotiate the merger or perhaps cash takeover bid which will, in one way or another, benefit them personally the most. After that agreement is negotiated, there is little if anything shareholders can do to generate a more favorable alternate plan. Since the director-approved proposal will be better for the shareholders than nothing, shareholder approval is normally obtainable with no difficulty.

Source of Funds

Another interesting requirement of the statute is that the source of funds must be disclosed before the tender offer is made. Anyone familiar with the SEC's concern with the use of funds from Swiss banks may immediately suspect an ulterior motive here. Clearly, an individual who decides to *sell* his shares cannot be injured by the fact that the lender of funds used in a tender offer was a Swiss bank, Aunt Jenny, or the Cosa Nostra.³⁶ However, we should not be fooled into thinking that mere disclosure of such a matter is an innocent and passive kind of regulation. On the contrary, this provision would considerably enhance the SEC's powers over foreign sources of funds,³⁷ even though there is today no directly authorized method for acquiring this power. But if this power is to be given the SEC—and perhaps it should be—full hearings on *that subject* seem in order. As it is, this provision appears to be sneaking in the back door.

³⁵ See *ibid.*

³⁶ This is not to say that the use to which profits from criminal activity are put is not an important matter for government concern. It is, and it has been, appropriately investigated by many agencies. It is nonetheless questionable whether it is relevant in the present context. Certainly *most shareholders* who sell out are unconcerned about the identity of the buyer of their shares or the source of his funds.

³⁷ Power over foreign monetary sources would come from the kinds of disclosure the SEC could demand. For instance, before funds borrowed from the Swiss bank could be used, the SEC may demand disclosure of the *names of depositors* in that bank, whose funds might directly or indirectly be involved, even though Swiss domestic law forbids disclosure of those names. This example may in turn be related to another point that Chairman Cohen discusses, contrasting the SEC's position with that of the legislation in Canada, where a takeover bid can be made for an undisclosed principal. The bill before Congress would not allow this. Cohen tells us that in the report leading to the Canadian legislation, fears were expressed that such disclosure might discourage some takeover bids. But the Chairman states categorically that "the materiality to shareholders of the identity of the potential control person . . . is simply too great not to require that it be disclosed." Cohen, *supra* note 6, at 154.

Description of "Special Arrangements"

The proposed legislation would also require that "special arrangements," including options, guaranties, and proxies, be fully described. This provision will serve to illustrate another crucial problem with this kind of regulation. Again, on the surface it seems innocent enough; if truthful and full disclosure is made, there seems to be no substantive "punch" to the provision. Unfortunately, this overlooks the myriad ways in which both government and private lawyers discover new grounds for law suits, and we must keep in mind that the incumbent managers will almost inevitably be hostile to the tender group. If the management can find any superficially reasonable basis for bringing a law suit, they may be able to delay the tender offer in such a way as to effectively kill it. Recent Supreme Court cases make it quite easy for civil actions, including the right to sue for an injunction, to be brought on the basis of the various federal security acts.³⁸ The bill under consideration is replete with disclosure requirements for material that could serve as the basis for law suits, most of which would in fact be tactical devices for delay.

Freezing Prices

It often occurs with a tender offer for control that the first offering price is insufficient to gain the desired number of shares. In this case second and perhaps additional tender offers may be made in order to secure the needed shares. This is particularly apt to occur if for any reason—always in the shareholders' interest—competing offers develop, or the incumbent managers do or say something to raise the price of the shares. This would always seem to signify the appropriate functioning of the market, since each increment in the offering price should elicit an additional market supply of shares.³⁹

Unfortunately, however, the bill under consideration would

³⁸ See *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

³⁹ A price increment will tend to increase supply because individuals will have different marginal utilities for their shares. Their offering of shares in turn dictates the supply curve of a particular stock, which will always be positively sloped. See LEFTWICH, *THE PRICE SYSTEM AND RESOURCE ALLOCATION* 44 (3d ed. 1966); STIGLER, *THE THEORY OF PRICE* (3d ed. 1966). It certainly cannot be said that the highest price reached in this process is in any relevant sense the "correct" price or the "adequate" price or the "fair" price. It is simply the price required to call forth the final increment of shares demanded by the buyer.

prevent just that perfect functioning of the market. One provision requires all shareholders to receive the higher price in a second tender offer, even though many may have accepted the lower price of an earlier offer. Here again, in the name of some misplaced concept of equal treatment, there appears to be some misunderstanding of how competitive markets function.⁴⁰ It is no proof of an invidious form of price discrimination that identical goods may be acquired at varying prices at different times, and there is no logic known to economic theory or law dictating that individual contracts should not be enforced merely because at a later time the price goes up. Carried to its logical extreme, Chairman Cohen's notion would require all transactions in the open market to be treated in the same way. Whether there was a tender offer or not, if control were sought, the same argument for equal treatment could be made. The net effect of the bill's provision is simply to raise the cost of acquiring corporate control, but with no evident justification.

Disclosure of Market Activities

The bill also requires disclosure of the offeror's market activities in the company's securities. This provision may be related to the requirement that if a tender price is increased in a second offer, all shareholders are entitled to receive the new price. Here, the concern may be with those shareholders who sold on the open market prior to the announcement of the tender. Generally such an announcement causes an immediate increase in the market price for shares. As is true with any undisclosed favorable news, the sellers have sold for less than they could get if they had held their shares until after

⁴⁰ This same error regarding the nature of competitive processes occurs in Chairman Cohen's defense of another provision of the bill: "For similar and additional reasons we also wanted to avoid having shareholders rush to accept an offer. To accomplish this, we suggested that where the person making the offer takes less than all the shares tendered, he should be required to take them on a pro rata basis." Cohen, *supra* note 6, at 153-54. Clearly what has happened in such a circumstance is that the offering price was too high, as the proper offering price should just elicit the desired number of shares. But it does not follow in the name of equal treatment that pro rating is the indicated solution. The mathematical and administrative problems in administering this solution can be horrendous, and they will represent a sharp increase in cost for the outsider. Some, however, will want to condition their offer on pro rata acceptance if too many shares are offered. This may be because the offeror prefers this solution even with a higher cost or because he does not see the total cost as being significantly higher. But for those who do, Chairman Cohen has not offered a good reason why pro rating should be mandatory.

the announcement.⁴¹ Those shareholders who sold in the open market prior to the announcement of the tender offer might be in a position to sue under SEC Rule 10b-5 to recover the higher price paid in the tender offer.⁴² Thus, again the effect of the bill is to raise the total cost of buying control by preventing outsiders from utilizing the best combination of market strategies.

Disclosure of Business Plans

One of the key provisions of the bill requires a purchaser of control to disclose in advance his plans for the future conduct of the business, including whether he plans to liquidate it. There are several fundamental problems in this provision. First of all, there is a subtle implication that liquidation is an undesirable policy from the shareholders' point of view.⁴³ This, of course, is nonsense; it may be their most desirable course. It should not be treated differently or more harshly in this context than any other management policy.

However, the biggest problem with this provision may come from minority shareholders seeking to upset management decisions by holding management to the policy specified under the tender offer disclosure requirement. At least one case⁴⁴ has specifically allowed such a contention to succeed, though it is far from certain that other courts would follow the broad grant of managerial power given minority shareholders by that decision. Even if civil suits of this sort are not generally successful,⁴⁵ no one would question the SEC's

⁴¹ See MANNE, *INSIDER TRADING AND THE STOCK MARKET* 86-90 (1966).

⁴² Cf. *List v. Fashion Park, Inc.*, 340 F.2d 457 (2d Cir.), cert. denied sub nom. *List v. Lerner*, 382 U.S. 811 (1965) (application of 10b-5 to situation involving undisclosed merger negotiations).

⁴³ Cf. note 14 *supra*.

⁴⁴ *United Funds, Inc. v. Carter Prods., Inc.*, CCH 1961-1964 FED. SEC. L. REP. ¶ 91288 (Md., Baltimore City Cir. Ct., May 16, 1963).

⁴⁵ *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), and *Kardon v. National Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa. 1947), make it clear that a civil action is available. *United Funds, Inc. v. Carter Prods., Inc.*, *supra* note 44, stands for the proposition that action contrary to intentions stated in a prospectus under the '33 Act provides the basis for a cause of action. The case involved a management attempt to maintain control of a corporation by issuing non-voting shares. The effect of this would have been to cause the corporation to be delisted by the New York Stock Exchange, and this, the court held, was contrary to a promise implied in the prospectus. Even though cases under the provision being discussed might not involve control, as the *United Funds* case did, the logic would still seem applicable. If any program contrary to that proposed in the disclosure lost money, a civil action to recover that loss from the managers might succeed.

At a very minimum, if we must have statutory regulation of cash tender offers, the

authority to bring action for false and misleading statements if management veered too far from the policies announced in its tender offer. This would, in effect, put every company which was the subject of a successful takeover in the same category as corporations subject to the far-reaching provisions of the Investment Company Act of 1940.⁴⁶

More important, however, is the fact that this provision, which not only requires disclosure of future plans but involves some risk of liability if they are not carefully observed, applies *only* to tender offerors. We have no comparable requirement for incumbent managers. They may change their management policies almost at will and without fear of liability simply for doing so.⁴⁷ Clearly, this is a very substantial burden placed on the outsider compared to that placed on existing managers. And yet no reason is offered why successful bidders should operate under this kind of handicap. We are not entitled to any easy assumption that they are less able, less honest, or more "affected with a public interest" than those managers who have not been displaced.

Still a third problem with this provision involves the matter of industry competition. It is almost inconceivable that public disclosure of future plans for operation, or liquidation, would not be of very keen interest to competitors. Nor is it satisfactory for the SEC to offer to keep such matters confidential. This would surely put the SEC into the business of approving or disapproving changes in the plan previously disclosed. But whether the plan is disclosed or confidential, how many potential managers want to be strictly held to follow a specific program of operation? Outside potential managers are in an especially bad position to formulate policy of this sort, and they should not be required to do so. This may indeed be the

bill should specify that only the SEC and not private litigants are authorized to raise these questions of business policy. Cf. Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 Nw. U.L. REV. 627 (1963). The sound argument for the business judgment rule to prevent courts from making or second-guessing purely business decisions should not be lost accidentally. It is another thing, of course, to give that authority to an expert agency. It still may not be a good idea, but it is not as inappropriate as forcing that responsibility onto the courts.

⁴⁶ 54 Stat. 811 (1940), 15 U.S.C. 80a-14 (1964).

⁴⁷ The only general limitations upon incumbent managers would seem to be an action like that in *United Funds, Inc. v. Carter Prods., Inc.*, CCH 1961-1964 FED. SEC. L. REP. ¶ 91288 (Md., Baltimore City Cir. Ct., May 16, 1963), relying heavily on RESTATEMENT, CONTRACTS § 90 (1932) (promissory estoppel); an action based on the *ultra vires* doctrine, or one based on an express promise.

single most damaging provision in the entire bill, and yet, without it, the thrust of the SEC's major concern over cash tender offers seems lost.

Shareholder's Option to Withdraw

Another provision of the bill gives shareholders seven days after acceptance of an offer to withdraw. This is done in order to let incumbents battle the attempted takeover after they learn of it. Chairman Cohen stated that the twenty-day notification-to-the-corporation provision of an earlier draft gave too great an advantage to incumbent groups. The SEC also proposes a five-day, confidential, pre-offer notification provision.⁴⁸

It is hard to imagine a more unsettling kind of arrangement. It will be difficult and costly for offerors to keep their financing commitments intact for this additional week. This provision in effect requires offerors to give a seven-day "put" to all shareholders for no compensation. If the market goes down for *any reason*, these shareholders will be in the strange position of having an option to sell. If it goes up, however, they are not obliged to sell. Clearly this kind of risk assumption, as the normal commercial market for puts indicates, is costly. Thus, in still another way does this regulation raise the cost of acquiring corporate control.

Chairman Cohen justifies the seven-day provision on the ground that management should have an opportunity to make its case after a tender offer has occurred. Presumably, this means that Chairman Cohen is in agreement with the statement of various corporate managers that the current stock market price for their company's shares is not the correct price and should be higher, although the SEC has recently taken steps to police and regulate the activities of corporations seeking to publicize their own stock in order to raise its price.⁴⁹ However, if the present market price is indeed incorrect, then the stock market is not functioning properly to determine the price of securities, and the SEC ought to find out why. But, assuming imperfections in the market, companies should be allowed to tout their

⁴⁸ The bill as actually introduced contains an additional provision, § 2(4), allowing shareholders to withdraw their acceptance at any time within sixty days after the tender offer was made. See note 5 *supra*. This could, in many instances, provide a longer period for an incumbent counterattack than the original twenty-day waiting period.

⁴⁹ See Cohen, *supra* note 6, at 155-56.

own shares in order to correct the market price, or outsiders should be allowed to perform that function.

In fact there are no indications that the market is not correctly performing its pricing function. Therefore, to say that existing management should be given an opportunity to make its case when confronted by a tender offer in excess of the present market price suggests that the SEC is taking sides and assisting incumbent managers in what should be a hands-off fight. The seven-day time period is not long enough (or the circumstances appropriate) for the development of real competitive offers, so the major effect of this time requirement will be to allow management to find some grounds for a delaying injunction.

CONCLUSION

One might have thought the need for legislation of this sort would be documented by obvious cases of malfunctioning of the market for corporate control. It is interesting, therefore, to note that the Chairman of the Securities and Exchange Commission does not offer a single case establishing any injury or socially undesirable conduct which can be cured only through the mechanisms of this bill. The really undesirable cases which do come up in discussions of this subject almost inevitably involve criminal actions, common law fraud, or manipulation. In many of these cases the burden of proof required by courts of law is quite strict; but this burden of proof, whether it arises in litigation or in administrative proceedings, should not be relaxed too much. Without clear evidence of undesirable effects from a practice like tender offers the strict rules for proof of fraud serve the salutary function of preventing excessively easy and therefore possibly arbitrary regulation of free markets. Certainly it is an insufficient justification that the stricter standards of proof put a heavier work burden on the administrators of our security laws.

Chairman Cohen claims that the Commission already has authority without additional legislation to promulgate rules having the same effect as the bill under consideration.⁵⁰ That statement should not be taken at face value. There are many procedural and judicial safeguards built into the administrative rule-making procedure that do not apply to congressional action. There must, for example, generally be careful and detailed hearings with notice given to inter-

⁵⁰ *Id.* at 156.

ested parties,⁵¹ and the judicial review is far more detailed and effective.⁵² It is on occasion much easier to get an act through Congress than a rule through the SEC. This is especially true when political forces are such that the bill may have a good chance of passing for reasons unrelated to its intrinsic merits.

It is not difficult to guess how bills such as the one under consideration come to be proposed. These bills were probably incited by occasions on which corporate control was lost as a result of public cash tender offers. These may have been classic cases of takeovers by an honest entrepreneur acting in his own self-interest but incidentally benefiting all the noncontrolling shareholders in the corporation. The ousted heads of the companies, or perhaps their investment bankers,⁵³ might have complained bitterly to their congressmen, thus precipitating legislation like that under consideration.⁵⁴ It is ironic to find the SEC taking sides with those identical interests.

As noted above, if these provisions resulted from SEC rule-making, careful analysis of the whole subject might be required. In place of a systematic analysis, however, we find the following statement: "While the disclosure required by the bills might discourage *some tender offers*, it is perhaps a small price to pay for an informed choice by shareholders."⁵⁵ Chairman Cohen really begs all the difficult questions in this statement. How many tender offers will be discouraged? What is the price that shareholders will thereby be paying? How is this to be computed? No intelligent decisions can be made in this field until these questions can be answered with some degree of accuracy. Systematic study and answers to these questions should be forthcoming before this legislation is advanced. That is, after all, why administrative agencies comprised of experts in the field were established.

⁵¹ 5 U.S.C.A. §§ 551-59, 701-06 (Special Pamphlet 1966).

⁵² 4 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 29.01-.11 (1958, Supp. 1965).

⁵³ Investment bankers, who have a continuing interest in the management of many companies, are a likely source of pressure for this bill, as are insecure managers who fear an attempted takeover.

⁵⁴ The original version of the Williams bill, with which the SEC disagreed, had a provision strongly manifesting the inspiration of incumbent management. That bill would have required twenty days advance notice *to the corporation* before tenders could be solicited. Nothing appeared in that version suggesting the necessity of disclosure to the shareholders, or, for that matter, to the SEC. Such a provision could certainly not have been proposed with the interest of shareholders in mind. Rather it seems to have been exclusively designed to protect and insulate incumbent management, no matter how bad, from outsiders.

⁵⁵ Cohen, *supra* note 6, at 151-52. (Emphasis added.)