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STATE REGULATION OF TENDER OFFERS

JAMES J. MOYLAN*

I. INTRODUCTION

Federal lawmaking is often complemented and enhanced by state and local legislation. Oftentimes the federal regulatory scheme sets forth the minimum standards of conduct with the states and local jurisdictions free to demand adherence to more stringent requirements.¹ On the other hand, some federal regulation is to be dominant with state legislation playing little, if any, role in the scheme of things.² Recent state legislation in the tender offer—take over area is in some respects inimical to the federal regulatory pattern. It will be the purpose of this article to examine the pertinent provisions of these state statutes with a view towards determining their compatibility and constitutionality within the federal framework of securities regulation.³

II. FEDERAL REGULATION

The Williams Bill⁴ was the response of the Congress to the proliferating, unregulated area of tender offers. It was enacted in 1968,⁵ amended in 1970,⁶ and among other things, comprises sections 14(d), (e) and (f) of the Securities Exchange Act of 1934.⁷

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1. Witness the statement in the National Environmental Policy Act 42 U.S.C. 4321, 4371 (1969): "... [T]he primary responsibility for implementing this policy [Environmental Quality Improvement] rests with State and local governments."

2. See, e.g., Federal Aviation Act 49 U.S.C. 1301 *et. seq.* (1970); See *Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973), recognizing the necessity for uniform federal regulation of flight control, cited in Note, *Commerce Clause Limitation Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1164-6 (1974) [hereinafter cited as *Commerce Clause*].

3. This discussion will be limited to cash tender offers. Exchange offers, involving stock for stock swaps require registration under the Securities Act of 1933 [15 U.S.C. 77a *et. seq.* (1970)] and under state Blue Sky law. The Blue Sky regulatory scheme provides that the various state securities commissioners can deny registration of an offering based upon its investment merits. See, generally, ARANOW & EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* (New York: Columbia University Press 1973) at 168-9. [hereinafter cited as ARANOW & EINHORN].

4. CONG. REC.: S.510, 90TH CONG., 2D SESS., 114 CONG. REC. 21481 (1968).

5. Pub. L. No. 90-439 (originally enacted July 29, 1968, 82 Stat. 454).

6. Pub. L. No. 91-567 (originally enacted December 22, 1970, 84 Stat. 1497).

7. 15 U.S.C. §78n(d), (e) and (f) (1970) [hereinafter cited as Exchange Act]. Section

This was the second attempt by Congress at regulation in this area. An earlier bill⁸ had been introduced to protect American companies and their management from raids by corporate "pirates."⁹ This bill was to require that the bidder give twenty days advance notice to the target corporation and the Securities and Exchange Commission of his intent to make a tender offer. This bill never made it out of committee. In the intervening period the subject of regulation of tender offers was accorded a great deal of discussion by members of the Commission, various national securities exchanges, the industry and academia. The prevailing view ultimately recognized the economic utility of tender offers in not only providing a swift mechanism to dispose of inefficient management,¹⁰ but also as a method of obtaining an investment position in a company with relative facility. Thus, the focus of the legislation changed from one of protecting incumbent management to one of providing "full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case."¹¹

The congressional intent in enacting the legislation is very clear; neither the incumbents nor the insurgents are to enjoy any advantage over the other when five percent or more of a class of a reporting company's equity securities become the subject of a tender offer.¹² Moreover, the investing public is to be provided with certain material information to enable them to render an informed investment judgment on whether to hold, sell or tender their securities.¹³ A proposal for pre-notification to the target company or even the Commission was expressly rejected due to the possibility of causing undue market fluctuations and unfairness to the bid-

14(d) *et. seq.* of the Exchange Act and the rules and regulations promulgated thereunder [17 C.F.R. 240. 14d-1, -2, -4; 14f-1 and 13d-101 (1974)] comprise what has been referred to as, the tender offer provisions of the federal securities laws.

8. CONG. REC.: S.2731 89th Cong., 1st Sess., 111 CONG. REC. 28256 (1965).

9. See 111 CONG. REC. 28256-7 (1965) (remarks of Senator Williams).

10. See Moylan, *Exploring the Tender Offer Provisions of the Federal Securities Laws* 43 GEO. WASH. L. REV. 557 (1975) [hereinafter cited as Moylan], citing ARANOW & EINHORN, *supra* note 3, 66. See also 113 CONG. REC. 24664 (1967).

11. See 113 CONG. REC. 854-55 (1967) (Remarks of Senator Williams).

12. "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids." 113 CONG. REC. 24664 (1967).

13. See generally, *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 597 (5th Cir. 1974); *Cattleman's Investment Co. v. Fears*, 343 F. Supp. 1248, 1251 (W.D. Okla., 1972) vacated per stipulation Civil Action No. 72-152 (W.D. Okla. May 8, 1972).

der.¹⁴ The rules promulgated, under the tender offer and antifraud provisions of the federal securities laws, foster the goals of fairness and equality and the Commission has not been hesitant to authorize injunctive actions to prevent any party from taking unfair advantage.¹⁵

III. STATE REGULATION

Despite the clear expression of congressional intent to balance the various competing interests to the benefit of the investing public, several states have thumbed their noses at the principles propounded in the Williams Act. Some did so in such an overt and deliberate manner as to raise serious questions about their motives.¹⁶

14. *Hearings on H.R. 14475 and S. 510 before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce*, 90th Cong., 2nd Sess. 44 (1968) (remarks of Donald L. Calvin, Vice President of the New York Stock Exchange.) [hereinafter cited as *1968 House Hearings*]. See also Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAW 149, 152-3 (1966) [hereinafter cited as Cohen]; cf. Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 DUKE L. J. 231 [hereinafter cited as Manne].

15. See SEC v. Weisberger, 74 Civ. 4450 (S.D.N.Y. Oct. 10, 1974); Complaint summarized at CCH FED. SEC. L. REP. ¶ 94,827 (1974); Consent injunction obtained against individuals violating Section 10(b) [15 U.S.C. 78j(b) (1970)] of the Exchange Act and Rule 10b-4 [17 C.F.R. 240. 10b-4 (1974)], promulgated thereunder. This is the "short tendering rule" and designed to promote the policy of giving all tendering shareholders the right to have their shares, beneficially owned at the time of the offer, taken up pro rata, Section 14(d)(6) [15 U.S.C. 78n(d)(6) (1970)]; SEC v. Sorg Printing Co., Inc., Civ. Act No. 74-3634 (S.D.N.Y. August 21, 1974); Complaint summarized at CCH FED. SEC. L. REP. ¶ 94,767 (1974). Permanent injunction by consent to prohibit the company and some of its employees from executing transactions in securities they know to be involved in tender offers due to their printing of the tender offer soliciting materials; see also, SEC v. Healey, 74 Civ. 4305 (S.D.N.Y. October 1, 1974) and SEC v. Cox, 74 Civ. 3363 (N.D. Ill. November 20, 1974) involving complaints for injunctions against the defendants for trading in the securities of an issuer which the defendant knew would become the subject of a tender offer.

16. To their credit the states of Illinois and Pennsylvania did not pass takeover legislation although each had considered bills to protect local companies. In Illinois the legislation was introduced in response to Ling-Tempeco-Vought's acquisition of Wilson and Co. and the takeover of Armour and Co. by General Host. Pennsylvania had to grapple with such legislation because of the attempts to takeover Sharon Steel Corp., Piper Aircraft and Westinghouse Air Brake Co. See Aranow & Einhorn, *State Securities Regulation of Tender Offer*, 46 N.Y.U. L. REV. 767, 768-9 n.10 (1971), [hereinafter cited as 46 N.Y.U. L. REV.]. Pennsylvania, however, announced that a bidder in a "cash takeover bid" is deemed a dealer in securities and is required to register. Pa. Sec. Comm. Bull. June 1, 1969, 3 CCH BLUE SKY L. REP. ¶ 41,336 (1969). Illinois was almost persuaded to enact similar special legislation with respect to countering Loew's Corp.'s tender offer for CNA Financial Corp., an Illinois based company. See Wall Street Journal, June 6, 1974 p. 8 Col. 3.

It should also be noted that Kansas recently enacted its own "Takeover Bid Disclosure Law" incorporating various features of the other states' statutes in this area, KAN. STAT. ANN. 17-1276 *et. seq.* (Supp. 1975). However, since it does not apply to companies regis-

The states enacting such legislation advance several rationales for assuming authority over tender offers for companies incorporated in or based within their respective boundaries. They first proclaim the need to afford investors additional protections in this area. They then proclaim that they are acting out of a concern for the takeover bid's effect upon competition, the efficiency of the target corporation, local versus decentralized control of the entity, debt-equity structure and the concomitant impact on the target's management, employees, customers, suppliers and creditors.¹⁷ Further justification is based on the grounds that states have a legitimate interest in the internal affairs of a corporation and thus can legitimately legislate in this area.¹⁸

It is submitted, however, that this type of state legislation is a reaction to the fear that such a bid will adversely effect the local economy.¹⁹ This is evidenced by the fact that even though tender offers are used for purposes other than obtaining control of a corporation,²⁰ state legislation has denominated all tender offers "take-overs." It will become clear that some provisions of the various state statutes are designed to protect incumbent management against the insurgents and are not for the protection of investors. In fact, in some instances management is benefited to the detriment of the shareholders. It is little wonder that incorporation in these states is considered a good defensive tactic to a tender offer.²¹

A. Ohio

The Ohio Takeover Act²² is one of the most glaring examples of special interest legislation.²³ It was enacted in response to the bid by Northwest Industries, Inc. for B. F. Goodrich & Co., an

tered under the Exchange Act [KAN. STAT. ANN. 17-1285 (Supp. 1975)] it is inapposite to this discussion.

17. Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722, 756 (1970), [hereinafter cited as Shipman].

18. *Id.* at 724.

19. *Accord*, 46 N.Y.U. L. REV., *supra* note 16, at 768.

20. *See* Moylan, *supra* note 10.

21. Vaughan, *Tender Offers in Virginia*, 7 THE REVIEW OF SECURITIES REGULATION 879 (1974) [hereinafter cited as Vaughan]. For other defensive tactics, *see also*, ARANOW & EINHORN, *supra* note 3, chapter 9 "Defensive Tactics to Thwart a Tender Offer" at 219-74; Yoran (Jurkevitz), *Advance Defensive Tactics Against Takeover Bids*, 21 AM. J. OF COMP. L. 531 (1973).

22. OHIO REV. CODE ANN. § 1707.041 *et. seq.* (Page Supp. 1973).

23. *Accord*, Sommer, *The Ohio Takeover Act: What is it?* 21 CASE W. RES. L. REV. 681, 720 (1970) [hereinafter cited as Sommer].

Ohio based company.²⁴ Although the Ohio bill's proponents²⁵ paid lip-service to investor protection it was quite evident that the legislation was proposed to protect the management of Ohio's industries.²⁶

In pertinent part, the Ohio act virtually precludes a cash tender offer for an Ohio based company.²⁷ The law requires that the offeror publicly announce the terms of the offer and file the soliciting materials with the Division of Securities and send them to the target corporation twenty days prior to the effective date of any bid for ten percent or more of a class of the target's outstanding securities.²⁸ The bid is not thereafter self-effective. A hearing can be ordered by the Division or upon a finding of cause under a request of the target corporation.²⁹ It should not be too difficult for a target corporation adverse to a tender offer to frame at least one plausible issue worthy of a hearing.

The hearing is primarily concerned with the adequacy and accuracy of the bidder's disclosure but additionally can result in denial of effectiveness if any provision of the Ohio Blue Sky Law is found to have been violated.³⁰ Aside from the disclosure required under the tender offer provisions of the federal securities laws, Ohio requires additional disclosure³¹ by the bidder which is comparable to the disclosure required by an issuer in a registration statement filed pursuant to the Securities Act of 1933.³² Although the amount of disclosure required is burdensome, it is the provision for the hearing and its duration which is the death knell of a tender offer for an Ohio based company. The Act provides that a hearing be held within forty days of the filing and that the issues be adjudicated within sixty days of the filing.³³ Since a tender offer de-

24. See 46 N.Y.U. L. REV., *supra* note 16, at 768-69 n.10.

25. See Vorys, *Ohio Tender Offer Bill*, 43 OHIO BAR 65 (1970) [hereinafter cited as Vorys].

26. *Accord* 46 N.Y.U. L. REV., *supra* note 16, at 767; Sommer, *supra* note 23, at 720.

27. The Ohio Act applies to any company incorporated in Ohio or a company which has its principal place of business in the state and substantial assets there. OHIO REV. CODE ANN. § 1707.041 (A)(1) (Page Supp. 1973).

28. OHIO REV. CODE ANN. § 1707.041(B)(1) (Page Supp. 1973).

29. *Id.*

30. See, Shipman, *supra* note 17, at 735.

31. OHIO REV. CODE ANN. § 1707.041(B)(3)(g) and (h) (Page Supp. 1973).

32. 15 U.S.C. 77a *et. seq.* (1970) [hereinafter Securities Act]. *Accord*, Shipman, *supra* note 17, at 733; 46 N.Y.U. L. REV., *supra* note 16, at 774.

33. OHIO REV. CODE ANN. § 1707.041(B)(4) (Page Supp. 1973). Under federal law a tender offeree may withdraw shares tendered if not taken up after sixty days of the date of the offer, 15 U.S.C. 78n(d)(5) (1970).

pend upon speed and surprise for its effectiveness, the hearing and pre-filing requirements can nullify the success of the tender offer.³⁴

Even though the nullification of the tender offer is deemed "good" by select parties in Ohio and "bad" by the bidder, there are other aspects of the law which are detrimental to the target's shareholders, the investing public and the national market for the company's securities. The hiatus and uncertainty created by a hearing could cause the exchange upon which the securities are listed for trading, and the Commission, to halt or suspend trading in the target's securities until final adjudication in order to avoid a chaotic market.³⁵ In such an event everyone suffers at the expense of protecting incumbent management.

The Ohio Act also has several other provisions which can prove irksome to a bidder in addition to being contrary to federal law. A bidder, who in the preceding year obtained five percent or more of the specified class of security of the target without giving notice of his intent to acquire control cannot publish a tender offer for additional shares for another year.³⁶ In addition, any takeover bid must be made by an Ohio based securities dealer.³⁷ Interestingly, the Ohio Act allows the target great latitude, within the confines of avoiding fraudulent activity, to combat the offer.³⁸

The Act does comport with federal legislation through its adoption of the Williams Bill's remedial provisions including the right of withdrawal within seven days of the offer,³⁹ but it does not offer final withdrawal rights after sixty days. It also provides for pro rata acceptance of shares tendered⁴⁰ and the highest, uniform price

34. See *Commerce Clause*, *supra* note 2, at 1136; *accord*, 46 N.Y.U. L. REV., *supra* note 16, at 775; Shipman, *supra* note 17, at 730.

35. See Statement by the New York Stock Exchange on Amend. Sub. S.D. No. 138 File No. 90 (Reg. Sess. 1969) reported at BNA SEC. REG. AND L. REP. No. at A 11-12 (1969). The New York and American Stock Exchanges for example have authority to halt trading in securities listed for trading on their boards. New York Stock Exchange, Inc., Constitution Art. III, § 7 (1973); American Stock Exchange, Constitution Art. II § 2 (1972). The SEC has statutory authority to suspend trading in a company's securities for ten day periods, 15 U.S.C. 78o(c)(5) (1970) over the counter market; 15 U.S.C. 78s(a)(4) (1970) listed securities.

36. OHIO REV. CODE ANN. § 1707.041(B)(2) (Page Supp. 1973).

37. OHIO REV. CODE ANN. § 1707.041(C) (Page Supp. 1973). The same is true in Pennsylvania, note 15 *supra*.

38. See Shipman, *supra* note 17, at 737.

39. OHIO REV. CODE ANN. § 1707.041(C) (Page Supp. 1973); 15 U.S.C. 78n(d)(5) (1970).

40. OHIO REV. CODE ANN. § 1707.041(C) (Page Supp. 1973); 15 U.S.C. 78n(d)(6) (1970).

to all tendering shareholders.⁴¹

While the Ohio Act contains additional provisions and other variations on the tender offer provisions of the federal securities laws, the ones discussed above are the most substantive and the most inimical to the federal regulatory scheme.

B. Virginia

The "Take-Over-Bid Disclosure Act"⁴² passed in 1968 by the Virginia legislature is purported to be a disclosure statute closely akin to the Williams Bill.⁴³ It was not until the Act was amended in 1970 that it assumed the character of special interest legislation. The amendments provide for a twenty day pre-filing of the cash or exchange offer with the State Corporation Commissioner and the target corporation's registered agent.⁴⁴ The filing is required whenever a bidder seeks to obtain ten percent of the securities of a non-exempt⁴⁵ target corporation which is incorporated in Virginia and doing business in the state.⁴⁶

The 1970 amendments also granted the Commissioner authority to order a hearing within ten days of filing on its own motion or at the request of the target corporation if cause therefore is found.⁴⁷ A hearing must be commenced within forty days of the date of filing.⁴⁸ The issues to be determined at the hearing relate primarily to the adequacy and accuracy of the bidder's disclosure, which, like the Ohio Act, embellishes the federal disclosure standards by requiring information which is of questionable relevance to a shareholder facing a decision regarding whether he should sell, tender or hold the security.⁴⁹ No such burdens are placed upon the

41. OHIO REV. CODE ANN. § 1707.041(C) (Page Supp. 1973); 15 U.S.C. 78n(d)(7) (1970).

42. VA. CODE ANN. § 13.1-528 *et. seq.* (Supp. 1973).

43. Vaughan, *supra* note 21, at 779.

44. VA. CODE ANN. § 13.1-531(a) (Supp. 1973).

45. VA. CODE ANN. § 13.1-529(b) (Supp. 1973). The exemptions closely parallel those in the Williams Bill, Vaughan note 21 *supra*, at 779-80.

46. VA. CODE ANN. § 13.1-529(e) and (i) (Supp. 1973).

47. VA. CODE ANN. § 13.1-531(a)(1) and (2) (Supp. 1973).

48. VA. CODE ANN. § 13.1-534(b) (Supp. 1973).

49. The offer must contain: financial statements for the past three fiscal years and the current quarter, the names and biographical summaries of the offer's directors and executive officers, descriptions of the company's equity securities and long-term debt, the current business of the company and its subsidiaries for the past five years and its projected business, properties of the company and its subsidiaries, non-routine legal proceedings, and any material transactions between the bidder and its officers and directors within the preceding three years. VA. CODE ANN. § 13.1-531(b)(vii) (Supp. 1973). Of course, the commission can

target corporation except that any recommendations must not run afoul of the federal anti-fraud provisions and must be filed with the corporation commission.⁵⁰

Substantively, the Virginia Act requires the highest, uniform price to all tendering shareholders.⁵¹ It also provides for pro rata acceptance of shares tendered, but it extends the tender offer deposit period from the initial ten days to a deposit period of twenty-one days to thirty-five days⁵² and a withdrawal period lasting until the twenty-first day of the offer.⁵³ This is in direct variance to the seven day withdrawal period provided by federal legislation,⁵⁴ although the thirty-five day provision falls within the sixty day final withdrawal period provided by federal statute.⁵⁵ The lengthy deposit period of twenty-one days also conflicts with the ten day duration of a nationwide offer required by section 14(d)(6) of the Exchange Act.⁵⁶ In many instances, especially when the offer is for less than all the shares outstanding, more shares are deposited pursuant to the offer than the offeror is bound to accept. The Williams Act provides for pro rata acceptance of those shares tendered within the first ten day period and thereafter on a first come, first serve basis if additional shares are to be taken down.⁵⁷ The provision allowing for a twenty-one day deposit and withdrawal period benefits the target corporation, but it is at odds with the federal statutes and precludes their effectuation. In the alternative, compliance with federal law will, in some instances, cause the bidder to violate state law, creating an intolerable situation.

In addition, the Virginia statute bestows a different status upon the Virginia shareholder by granting him rights different from his non-Virginia counterpart. Thus the Virginia Act is arguably contrary to the egalitarian principles embodied in the Williams Act.

Finally, Virginia, like Ohio has made a brazen attempt to extend its regulation of tender offers to those offers made to non-residents of Virginia for Virginia based companies and to those

order additional disclosure, VA. CODE ANN. § 13.1-531(b) (Supp. 1973). *See generally*, Vaughan, *supra* note 21, at 880.

50. VA. CODE ANN. § 13.1-532 (Supp. 1973). *See generally*, Vaughan, note 21, *supra*, at 881.

51. VA. CODE ANN. § 13.1-530(d) (Supp. 1973).

52. VA. CODE ANN. § 13.1-530(a) (Supp. 1973).

53. VA. CODE ANN. § 13.1-530(b) (Supp. 1973).

54. 15 U.S.C. 78n(d)(5) (1970).

55. *Id.*

56. 15 U.S.C. 78n(d)(6) (1970).

57. *Id.*

offers made exclusively outside the state. The statute's feature of extra-territoriality raises questions as to its constitutionality.⁵⁸

C. Wisconsin

The Wisconsin statute⁵⁹ applies to those non-exempt⁶⁰ takeover offers for five percent⁶¹ of the equity securities of a corporation organized under the laws of the state, or which has its principal place of business and substantial portion of its assets located within the state.⁶²

The statute requires registration of the tender offer or non-exempt exchange offer by filing it with the State Securities Commissioner and the transmittal of the offer to the principal office of the target corporation by certified mail.⁶³ In addition, public disclosure of the material terms of the offer must be made not later than the time of filing.⁶⁴ The disclosure required in the registration statement is very similar to the disclosure of information contained on the Schedule 13D statement⁶⁵ filed pursuant to section 14(d)(1) of the Exchange Act⁶⁶ and Rule 14d-1 promulgated thereunder.⁶⁷ Additional disclosure of information about the bidder, of the type required by the Ohio and Virginia Acts, is similarly required by the Wisconsin statute.⁶⁸ Again, disclosure of information relating to the bidder's legal origins, capitalization, real estate, etc., is of dubious value to a tender offeree. Even if it is deemed relevant, a shareholder will have ready access to the information since most tender offers are made by public corporations already subject to the reporting requirements of the federal securities laws.⁶⁹ Thus, if

58. See 46 N.Y.U. L. REV. note 16, *supra*, at 772. It is questionable whether a nationwide offer, precluding shareholders of Virginia would be acceptable under federal standards. This issue, however, has never been adjudicated. *But see*, discussion at note 121, *infra*.

59. WIS. STAT. § 552.01 *et. seq.* (1973).

60. WIS. STAT. § 552.05(5)(a)-(g) (1973).

61. WIS. STAT. § 552.01(5) (1973).

62. WIS. STAT. § 552.01(6) (1973).

63. WIS. STAT. § 552.05(1) (1973).

64. *Id.*

65. 17 C.F.R. 240.13d-101 (1974).

66. 15 U.S.C. 78n(d)(1) (1970).

67. 17 C.F.R. 240.14d-1 (1974).

68. WIS. STAT. § 552.05(2)(c), (d) and (3) (1973).

69. 15 U.S.C. 78m and o(d) (1974). Private tender offerors perhaps should be subjected to additional state disclosure requirements, though many provide financial and other information, since the recent case of Corenco Corp. v. Schiavone and Sons, 448 F.2d 207 (2d Cir. 1973) which affirmed the district court's determination that a private corporation's failure to disclose financial information violated the anti-fraud provisions of the Exchange Act notwithstanding the fact that Schedule 13D does not require disclosure of financial

he is so disposed, a shareholder can ascertain whatever information he requires. Obviously, requiring make-weight disclosure is purely a protective tactic to cause a tender offeror to incur increased expenses and render the undertaking more complex, thereby increasing the likelihood that the target can find a plausible claim to raise before a state or judicial tribunal. With the necessity of overcoming these obstacles, it is no wonder that it requires a well-endowed bidder to seek an interest in a Wisconsin based company.

The Wisconsin statute also provides that ten days after the filing of the registration statement the offer will become effective unless the commissioner orders a delay to rectify disclosure,⁷⁰ or orders a hearing on his own motion or upon request of the target's board of directors.⁷¹ If a hearing is ordered it must commence within twenty days of the date of the filing and a determination must be made within thirty days of the close of the hearing unless this time is mutually extended.⁷²

The Act does not attempt to interfere with the activities of the target corporation in defending against the takeover except to the extent of admonishing that the solicitation material published by the target must not contain fraudulent statements.⁷³ Finally, the rights of withdrawal, pro ration and highest price are virtually identical to those found in section 14(d) of the Exchange Act.⁷⁴

D. Minnesota

The Minnesota "Corporate-Take-Over Law"⁷⁵ is a close relative to Wisconsin's law and similar to other state legislation in this area. It too applies to any non-exempt⁷⁶ tender offer or non-exempt exchange offer for more than ten percent⁷⁷ of an equity security of a corporation organized under Minnesota law or whose principal place of business and substantial assets are located in the state.

This legislation requires that the offer shall not be effective until at least ten days after the material terms thereof are disclosed

information. *See also*, ALI FEDERAL SECURITIES CODE §606(a) (Tent. Draft No. 1-3 revised) which calls for a bidder's disclosure of financial information (October 1, 1974).

70. WIS. STAT. § 552.05(3) (1973).

71. WIS. STAT. § 552.05(4) (1973). Because of the directors' fiduciary responsibilities, they may be compelled to seek a hearing.

72. WIS. STAT. § 552.05(5) (1973).

73. WIS. STAT. § 552.07(1) and (2) (1973).

74. WIS. STAT. § 552.11 (1973).

75. MINN. STAT. ANN. § 80 B. 01 *et. seq.* (Supp. 1973).

76. MINN. STAT. ANN. § 80 B. 01 Subd. 8(a)-(f) (Supp. 1973).

77. MINN. STAT. ANN. § 80 B. 01 Subd. 8 (Supp. 1973).

to investors⁷⁸ and the registration statement is filed with the State Commissioner of Securities and sent to the principal offices of the target by certified mail.⁷⁹ The Commissioner may summarily order a delay of the effectiveness of the offer if it is necessary to promote full disclosure of all facts deemed material.⁸⁰ The Commissioner may also order a hearing within ten days on his own motion or at the request of the target's board of directors or upon signed petition of shareholders owning, in the aggregate, ten percent of the target's securities which are the subject of the takeover.⁸¹ Apparently, the target need only request a hearing in Wisconsin and Minnesota and it will be granted. In Ohio and Virginia there must be a finding of cause whenever the target seeks to initiate a hearing. Of course, it is not likely that the target will bear any great burden in persuading a state securities commissioner that there is cause for a hearing.⁸²

The hearing, if ordered, must be held within twenty days of the filing date and a decision must be rendered within twenty days of the close of the hearing unless mutually extended.⁸³ A finding of inadequate disclosure or violation of Minnesota Blue Sky Law is grounds for denial of registration.⁸⁴

Consistent with the various state legislative schemes, there are practically no legal impediments to the activities of the target except the usual prohibitions against violations of the state and federal anti-fraud provisions.⁸⁵ Finally, the Act comports with the federal remedial provisions of the Williams Act regarding withdrawal rights, pro rata acceptance of shares deposited within the first ten days and highest uniform price to all tendering shareholders.⁸⁶

E. Nevada

The Nevada "Takeover Bid Disclosure Law"⁸⁷ is not a carbon

78. MINN. STAT. ANN. § 80 B. 03 Subd. 1 (Supp. 1973). Disclosure requires, at a minimum, the mailing of the tender offer registration statement to all state broker-dealers quoting the security.

79. MINN. STAT. ANN. § 80 B. 03 Subd. 1 (Supp. 1973).

80. MINN. STAT. ANN. § 80 B. 03 Subd. 3 (Supp. 1973).

81. MINN. STAT. ANN. § 80 B. 03 Subd. 4 (Supp. 1973).

82. *Accord, Commerce Clause*, *supra* note 2, at 1150-1.

83. MINN. STAT. ANN. § 80 B. 03 Subd. 5 (Supp. 1973).

84. *Id.*

85. MINN. STAT. ANN. § 80 B. 04 Subd. 1 (Supp. 1973); 15 U.S.C. 78j and n(e) (1970); 17 C.F.R. 240. 10b-5 (1974).

86. MINN. STAT. ANN. § 80 B. 06 Subd. 2, 3 and 4 (Supp. 1973).

87. NEV. REV. STAT. § 78.376 *et. seq.* (Supp. 1973).

copy of the legislation passed by the other states.⁸⁸ It contains a few provisions unique unto itself, including that it applies only to companies incorporated under Nevada law.⁸⁹ It applies to any non-exempt offer, by advertisement or other form of oral or written communication, to acquire shares of the target corporation when the offeror will own, in the aggregate, over ten percent of the company's securities.⁹⁰

The statute does require the filing of an information statement containing the disclosures required on the statement filed on Schedule 13D. The filing need only be made with the resident agent of the target ten days prior to the making of the offer.⁹¹ No administrative hearings are provided for; resort to the courts is all that appears contemplated.⁹²

The statute, like its federal counterpart, requires that the highest price is paid to all tendering shareholders.⁹³ Like Virginia, it substantially changes the deposit and withdrawal periods from seven to sixty days⁹⁴ to twenty-one to thirty-five days.⁹⁵ The pro ration provisions are contained in the statute but, under Nevada law, all securities tendered are subject to pro ration for the life of the offer.⁹⁶ One cannot help but wonder how a tender offeror bidding for more than ten percent but less than one hundred percent of the securities of the target will be able to comply with federal and Nevada law if his tender offer is successful on the eleventh day of the offer, especially when he reserves the right to take down more shares than those originally sought. Under federal law, securities tendered during the first ten days of the offer must be taken up pro rata,⁹⁷ on the eleventh day and all subsequent days it is first come-first served. On the eleventh day a tendering shareholder from the state of Nevada has a state cause of action if his shares are not accepted. Again, the situation arises where compliance with one law either precludes compliance with or violates other law.

88. The Nevada statute took effect on March 4, 1969. It is one year less one day younger than the original Virginia statute and seven months older than the Ohio statute. The Wisconsin and Minnesota statutes were the last to be enacted.

89. NEV. REV. STAT. § 78.3765 (Supp. 1973).

90. NEV. REV. STAT. § 78.377(a) and (b) (Supp. 1973).

91. NEV. REV. STAT. § 78.3771(1) (Supp. 1973).

92. NEV. REV. STAT. § 78.3774 (Supp. 1973).

93. NEV. REV. STAT. § 78.3772(4) (Supp. 1973).

94. 15 U.S.C. 78n(d)(5) (1970).

95. NEV. REV. STAT. § 78.3772(1) and (2) (Supp. 1973).

96. NEV. REV. STAT. § 78.3772(3) (Supp. 1973).

97. 15 U.S.C. 78n(d)(6) (1970).

IV. CONSTITUTIONAL ISSUES

A. Pre-Emption

Section 28 of the Exchange Act⁹⁸ provides:

Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security of any person insofar as it does not conflict with the provisions of this title of the rules and regulations thereunder.⁹⁹

It has been argued that this language is an adequate expression of the Congress' intent to pre-empt the field of securities regulation.¹⁰⁰ However, state and federal regulation of securities has existed side by side for many years.¹⁰¹ The rights of states to regulate the securities area has long been established. In fact, the states appear to have been there first.¹⁰² Blue Sky legislation has not been considered to be subject to pre-emption when it complements rather than conflicts with the federal regulatory pattern. This is not the case with state regulation of tender offers. This special interest legislation is not only inconsistent with the federal regulatory scheme, but on many fronts, is "in conflict" with the federal act.¹⁰³

98. 15 U.S.C. 78bb (1970).

99. *Id.*

100. Vaughan, *supra* note 21, at 881; *Commerce Clause*, *supra* note 2, at 1167-70; accord, Note, *Statutory Comments: Takeover Bids in Virginia*, 26 WASH. & LEE L. REV. 323, 333 (1969).

101. I. L. LOSS, *SECURITIES REGULATION* 28 (2d ed. 1961). Compare, Millonzi, *Concurrent Regulation of Interstate Securities Issues: The Need for Congressional Reappraisal*, 49 VA. L. REV. 1483 (1963) cited by 46 N.Y.U. L. REV., *supra* note 16, at 784 n.93.

102. The Supreme Court, in three early cases held that state securities regulation did not violate the 14th Amendment or unduly burden interstate commerce. *Merrick v. N. W. Halsey and Co.*, 242 U.S. 568 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Hall v. Geiger Jones Co.*, 242 U.S. 539 (1917).

103. See, e.g., *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), which sets forth the following test to determine if an area has been pre-empted by federal legislation.

(1) "... [T]he scheme of federal regulation [is] so persuasive as to make reasonable the inference that Congress left no room for the states to supplement it." 350 U.S. at 502. (Quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

(2) "... [T]he federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.'" 350 U.S. at 504. (Quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

(3) "... [E]nforcement of the state [law] presents a serious danger of conflict with the administration of the federal program." 350 U.S. at 505.

See also *Commerce Clause*, *supra* note 2, at 1163. Compare Joseph E. Seagrams and Sons v. Hofstetter, 384 U.S. 35, 45 (1966) cited by Vaughan, *supra* note 21, at 882, but

Certainly, the provisions of the takeover legislation enacted in Nevada, Minnesota, Ohio, Virginia and Wisconsin, which in whole or in part require burdensome and unnecessary disclosure through pre-filing and early disclosure of the tender offer registration statements, hearings and their consequent delays, along with substantial modifications of the federal remedial provisions, are adverse to the congressional intent¹⁰⁴ expressed in the Williams Act. All of the state requirements redound to the benefit of the target corporation by eliminating the essential elements of surprise and speed and leaving management unencumbered to wage its battle for self-perpetuation. But not only is the state legislation contrary to the philosophy of the federal act, it has been shown that various state statutory provisions differ to the extent of being in conflict with federal legislation.¹⁰⁵ In addition, a bidder's failure to disclose that his tender offer is in violation of state law is a material fact, arguably required to be disclosed under the anti-fraud provisions of the Exchange Act. Moreover, the practical effect of state tender offer legislation, to preclude tender offers and perpetuate management, is sufficient to find them "in conflict" with the Williams Act and consequently pre-empted.¹⁰⁶ Thus, it appears that the federal tender offer legislation pre-empts state regulation not only on philosophical and substantive grounds but upon general policy grounds as well.

B. Commerce Clause

Even more fundamental than the arguments surrounding the application of the pre-emption doctrine is the issue of whether state regulation of tender offers constitutes such a burden on interstate commerce as to violate the Commerce Clause of the United States Constitution.¹⁰⁷ In order for such a finding to be made, it must be shown that the state's regulatory activities place an excessive burden upon interstate commerce.¹⁰⁸ The original Blue Sky legislation

note in the Court's opinion, the emphasis placed upon the 21st Amendment in finding no Commerce Clause violation.

104. *Accord, Commerce Clause, supra* note 2, at 1168-70.

105. *See* text at 698 discussing compliance with section 14(d)(6) [15 U.S.C. 78nd(6) (1970)] in the face of pro rata acceptance during the entire course of the offer. *See* text at 13 discussing extended withdrawal rights which are in direct conflict with section 14(d)(5) [15 U.S.C. 78n(d)5 (1970)].

106. *Accord, Commerce Clause, supra* note 2, at 1170. *Compare, Vaughan, supra* note 2, at 882.

107. U.S. CONST. art. 1, § 8.

108. *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970); *Huron Cement Co. v.*

was found to comport with the federal legislative scheme.¹⁰⁹ It has withstood constitutional challenge because it promotes the legitimate state interest of attempting to assure that individuals within the state's boundaries are not subjected to fraudulent securities transactions.¹¹⁰ The takeover legislation enacted by the various states has extra-territorial application. We have seen that the various acts are designed to "protect" all shareholders of the target corporation no matter where their place of residence.¹¹¹ Some statutes also make illegal an offer for the securities of a target corporation which excludes the residents of the target state.¹¹²

Aside from the extra-territorial application of the various state acts, the provisions requiring disclosure of innumerable and various items places an unwarranted burden upon the offeror and is discriminatory, since the target is not held to the same rigorous standards of disclosure in combating a tender offer or purchasing its own shares.¹¹³ The advance notice requirement is not only contrary to the fundamental purpose of the Williams Act¹¹⁴ but also contains the potential to generate uncertainty and chaos in the nationwide market for the target's and bidder's securities.¹¹⁵ Certainly, should any state order a hearing on the tender offer it would not only be impossible for the offer to be concluded elsewhere, but also, as a practical matter, it would kill the offer.¹¹⁶ The offer would have to be extended until the issues raised were resolved, and the

Detroit, 362 U.S. 440, 443 (1960); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928). See generally, *Commerce Clause*, *supra* note 2, at 1152-62.

109. See note 102 *supra*, and accompanying text.

110. See *Shipman*, *supra* note 17, at 740; L. LOSS & E. COWETT, *BLUE SKY LAW* 173, cited in *Commerce Clause*, *supra* note 2, at 1153.

111. MINN. STAT. ANN. § 80 B. 01 Subd. 9 (Supp. 1973); NEV. REV. STAT. § 78.3765 (Supp. 1973); OHIO REV. STAT. ANN. § 1707.041(C) (Page Supp. 1973); VA. CODE ANN. § 13.1-529(e) (Supp. 1973); WIS. STAT. § 552.01(6) (1973).

112. OHIO REV. STAT. ANN. § 1707.041(C) (Page Supp. 1973); MINN. STAT. ANN. § 80B.06 Subd. 1 (Supp. 1973). See, 46 N.Y.U. L. REV., *supra* note 16, at 772.

113. *Commerce Clause*, *supra* note 2 at 1147.

114. See note 11 *supra*, and accompanying text. *Commerce Clause*, *supra* note 2, at 1147. In addition, advance disclosure of an exchange offer required to be registered pursuant to the Securities Act may violate the "Gun Jumping" provisions of Section 5 of the Act [15 U.S.C. 77e (1970)]; 46 N.Y.U. L. REV., *supra* note 16, at 775.

115. See note 35 *supra*, and accompanying text.

116. *Hearings on S. 510 Before the Subcomm. on Securities of the Comm. on Banking and Currency*, 90th Cong. 1st Sess. 59 (1967). (Remarks on S. Hayes III); ARANOW & EINHORN, *supra* note 3, at 11; *Commerce Clause* *supra* note 2, at 1136. See also, Vorys, *supra* note 25, "I suspect, so far as Ohio and Ohio-based corporations are concerned the corporate takeover, as a form of corporate warfare is a thing of the past. Acquisitions will hereafter be negotiated." at 73.

shareholders were again on equal footing. Moreover, the time period provided for from initiation of the hearing until decision, not counting the time involved in litigation, could well extend the tender offer past the sixty day deadline, thus allowing shareholders the right to exercise their federal rights of withdrawal.¹¹⁷ It is apparent that Congress did not contemplate delaying tactics to militate against the success of a tender offer. Such tactics are in conflict with the federal law. Congress recognized that tender offers serve legitimate and useful economic functions such as ousting inefficient management,¹¹⁸ increasing premiums for shares,¹¹⁹ and eliminating partial restraints on alienation.¹²⁰ The state legislation described here definitely constitutes an excessive burden on the free flow of securities in interstate commerce.

V. CONCLUSION

Congress obviously took great pains to strike an equitable balance among the competing interests in tender offers and at the same time provided substantive protections to the investing public. State statutes which are designed to protect incumbent management are adverse to the interests of the tender offeror and tender offerees as well as violative of the United States Constitution and the federal securities laws. Such legislation cannot be tolerated.

It may take a gutsy bidder, with sufficient time and money, to challenge the validity of this type of state legislation.¹²¹ Alternatively, the Securities and Exchange Commission and Congress could advocate legislation pre-empting the field before a panoply of varied and conflicting state legislation is passed, further mudd-

117. 15 U.S.C. 78n(d)(5) (1970).

118. ARANOW & EINHORN, *supra* note 3, at 5, 66; 113 CONG. REC. 24664 (1967).

119. *Commerce Clause*, *supra* note 2, at 1171 citing Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 113 (1965).

120. *Commerce Clause*, *supra* note 2, at 1171-2.

121. See ARANOW & EINHORN, *supra* note 3. One attempt was made in *Sparton Corp. v. Ward*, No. 243, 230 (C.P. Ct. Franklin City, Ohio, January 8, 1971) No. 71-8 (Ct. App. Franklin City, Ohio, January 12, 1971) where a New York bidder made an offer for the securities of an Ohio based company outside the state and prior to the expiration of twenty days from the time of the public announcement of the offer. The target company sued the Ohio Securities Commissioner and he was ordered to hold a hearing on the target's claims. The target then appealed to obtain a temporary injunction which was imposed on the bidder's solicitation pending the outcome of the Commissioner's hearing. At this juncture, however, the offer was withdrawn, at 161-2. Hence, the issues raised are still not settled but there is little doubt that the litigation influenced the bidder's decision to withdraw the offer.

ing these waters and further entrenching incumbent management through the elimination of the most efficient vehicle for holding them to account—the tender offer.

* Editor's Note: Finally, Colorado, Idaho, Indiana and South Dakota are currently debating or have just passed tender offer legislation.