SB

443

"An Act relating to disclosure requirements in takeover bids."

COMMITTEE REPORT

HOUSE

4/2/76

Mr. Speaker: Date May 5, 1976

The Committee on JUDICIARY has had CSSB 443 under consideration. A Majority of the members of the Committee

( ) recommends it DO PASS

( ) recommends it DO NOT PASS

( ) recommends it DO PASS WITH ATTACHED AMENDMENT(S)

( ) recommends it BE REPLACED WITH CS FOR _____ AND THAT CS FOR _____ DO PASS

( ) "and" recommends it BE REFERRED TO THE _____ COMMITTEE

( ) reports it back WITHOUT RECOMMENDATION

( ) "other"

Members signing the Majority report:

Terry Sandlin - Pres

Members NOT concurring in the Majority report:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

Terry Sandlin Chairman

Proposed
#1 Melton
5/5

Original sponsor: Commerce Committee

IN THE SENATE BY THE COMMERCE COMMITTEE

HOUSE CS FOR CS FOR SENATE BILL NO. 443

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to disclosure requirements in takeover bids."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 45 is amended by adding a new chapter to read:

CHAPTER 57. TAKEOVER BID DISCLOSURE ACT.

Sec. 45.57.010. PROVISIONS OF TAKEOVER BIDS. The following provisions apply to every takeover bid:

(1) The period of time within which securities may be tendered by an offeree under a takeover bid shall not be less than 21 days nor more than 35 days from the date copies of the takeover bid are first published or sent or given to offerees.

(2) Securities deposited under a takeover bid may be withdrawn by an offeree or his attorney-in-fact by demand in writing on the offeror or the depository at any time within 21 days from the date copies of the takeover bid are first published or sent or given to offerees.

(3) When a takeover bid is made for less than all the shares or other units of a class and when a greater number of shares or other units is deposited under it than the offeror is bound or willing to take up and pay for, the shares or other units taken up by the offeror shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of shares or other units deposited.

(4) When an offeror varies the terms of a takeover bid before the expiration of it by increasing the consideration offered, the

offeror shall pay the increased consideration to each offeree whose securities are taken up even if they have been taken up and paid for before the variation of the takeover bid.

(5) When a takeover bid is sent by mail to offerees, it shall be accompanied by a copy of the statement filed with the department under sec. 20 of this chapter.

Sec. 45.57.020. DISCLOSURE. (a) No offeror may make a takeover bid unless at least 20 days before it he files with the department and with the registered agent of the offeree company a statement containing all the information required by (c) of this section and either

(1) within 10 days following the filing no hearing has been ordered by the department or requested by the offeree company; or

(2) a hearing has been ordered within that time and upon the hearing the department has adjudicated that the offeror proposed to make fair, full and effective disclosure to offerees of all information material to a decision to accept or reject the offer.

(b) A hearing shall begin within 20 days of the date of filing of the statement and adjudication shall be made within 30 days of the filing unless extended by the department for the convenience of the parties or protection of the offerees.

(c) The statement to be filed with the department under (a) of this section shall include the following information and the additional information that the department may require as necessary in the public interest or for the protection of offerees:

(1) the name, address and business experience of the offeror and each associate of the offeror;

(2) the terms and conditions of the takeover bid, which shall include the applicable provisions of sec. 10 of this chapter;

(3) the source and amount of the funds or other consideration

used or to be used in making the takeover bid, and if any part of those funds or consideration is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of making the bid, a description of the transaction and the names of the parties to it, except that if a source of funds is a loan made in the ordinary course of business by a bank or financial institution customarily engaged in the business of making loans, it will be sufficient to so state;

(4) plans or proposals that the offeror may have to liquidate the offeree company, to sell its assets to or merge it with any other person, or to make any other material change in its business or corporate structure;

(5) the number of shares or other units of securities of each class presently owned by the offeror and each associate of the offeror;

(6) information as to any contracts, arrangements, or understandings with a person with respect to securities of the offeree company, 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 those contracts, arrangements, or understandings have been entered into, and giving the details of them;

(7) complete information on the organization and operations of the offeror, including without limitation the year of organization, form of organization, jurisdiction in which it is organized, a description of each class of the offeror's capital stock and of its long-term debt, financial statements for the current period and for the three most recent annual accounting periods, a brief description of the location and general character of the principal physical properties of the

offeror and its subsidiaries, a description of pending legal proceedings other than routine litigation to which the offeror or any of its subsidiaries is a party or of which any of their property is the subject, a brief description of the business done and projected by the offeror and its subsidiaries and the general development of that business over the past five years, the names of all directors and executive officers together with biographical summaries of each for the preceding five years to date, the approximate amount of any material interest, direct or indirect, of any of the directors or officers in a material transaction during the past three years or in a proposed material transaction to which the offeror or any of its subsidiaries was or is to be a party, and complete information concerning all inducements to officers and directors of the offeree company which are not made available to all security holders.

(d) The department may within 10 days of the filing order a hearing to determine whether fair, full and effective disclosure is proposed, if in the opinion of the department cause for a hearing exists. The offeree company may within 10 days of the filing request a hearing and the department shall upon receipt of the request order a hearing.

(e) All written soliciting material used by the offeror in connection with the takeover bid shall be filed with the department and the registered agent of the offeree company not later than three days before the time copies of the material are first published or sent or given to offerees.

(f) If, under an arrangement or understanding with the offeror, any persons are to be elected or designated as directors of the offeree company, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the offeree company, then, before the time that person

takes office as a director, the offeror shall file with the department, and transmit to all holders of record of securities of the offeree company who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by sec. 14(a) or 14(c) of the Securities Exchange Act of 1934 to be transmitted if the person was a nominee for election as a director at a meeting of the security holders.

Sec. 45.57.030. RECOMMENDATIONS TO ACCEPT OR REJECT. A written solicitation or recommendation to offerees, other than by the offeror, to accept or reject a takeover bid shall be filed with the department not later than the time copies of the solicitation or recommendation are first published or sent or given to offerees.

Sec. 45.57.040. DECEPTIVE PRACTICES. It is unlawful for a person to make or omit or cause to be made or omitted, in a document filed or in a proceeding under this chapter a statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in a material respect. It is unlawful for a person to engage in a fraudulent, deceptive, or minipulative act or practice, in connection with a takeover bid, or a solicitation of offerees in opposition to or in favor of a takeover bid.

Sec. 45.57.050. INVESTIGATIONS AND SUBPOENAS. (a) The department in its discretion may

(1) make public or private investigations inside or outside this state as it considers necessary to determine whether a person has violated or is about to violate a provision of this chapter or an order under this chapter[, or to aid in the enforcement of this chapter or in the prescribing of forms under this chapter];

(2) require or permit a person to file a statement in writing, under oath or otherwise as the department determines, as to all the

facts and circumstances concerning the matter to be investigated; and

(3) publish information concerning a violation of this chapter or an order under this chapter.

(b) For the purpose of an investigation or proceeding under this chapter, the department or an officer designated by it may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of books, papers, correspondence, memoranda, agreements, or other documents or records which the department considers relevant or material to the inquiry.

Sec. 45.57.060. INJUNCTIONS. When it appears to the department that a person has engaged or is about to engage in an act or practice in violation of a provision of this chapter or an order under this chapter, it may bring an action in the superior court to enjoin the acts or practices and to enforce compliance with this chapter or order under this chapter. The court may not require the department to post a bond.

Sec. 45.57.070. CRIMINAL PENALTIES. A person who wilfully violates a provision of this chapter, upon conviction, is punishable by a fine of not more than $5,000, or by imprisonment for not more than three years, or by both. However, no person may be imprisoned for the violation of an order if he proves that he had no knowledge of the order. No indictment or information may be returned under this chapter more than five years after the alleged violation.

Sec. 45.57.080. CIVIL LIABILITIES. (a) An offeror who (1) makes a takeover bid which does not comply with the provisions of this chapter or (2) makes a takeover bid by means of a statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in a material respect, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to any

offeree whose shares are taken up under the takeover bid. An offeree may bring civil action (1) to recover the shares, together with all dividends received, costs and reasonable attorney fees, upon the tender of the consideration received from the offeror, or (2) for the substantial equivalent in damages if the offeror no longer owns the shares.

(b) Every person who materially participates or aids in a takeover bid made by an offeror liable under (a) of this section, or who directly or indirectly controls an offeror who is liable, is also liable jointly and severally with and to the same extent as the offeror unless the person who so participates, aids or controls, sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. [There shall be contribution as in cases of contract among the several persons liable.]

[(c) A tender specified in this section may be made at any time before entry of judgment.]

(d) No person may bring action under this section unless brought within two years after the transaction upon which it is based. If a person liable under this section makes a written offer, before suit is brought, to return the shares taken up under the takeover bid, together with all dividends received, upon the tender of the consideration received from the offeror, or to pay damages if the offeror no longer owns the shares, no person may maintain a suit under this section unless he rejected the offer in writing within 30 days of its receipt.

(e) Any condition, stipulation or provision binding an offeree to waive compliance with a provision of this chapter or a regulation issued under it is void.

(f) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law

or in equity.

Sec. 45.57.090. CONSENT TO SERVICE OF PROCESS. A nonresident offeror, except a foreign corporation which has complied with AS 10.05.-597 - 10.05.696, who makes a takeover bid is considered to have appointed the commissioner of commerce and economic development as his agent upon whom may be served, in any matter arising under this chapter, any process, notice, order or demand except one issued by the department. Service may be made on the commissioner or any of his staff at his office. He shall send it by registered or certified mail addressed to the offeror at his latest address on file and keep a record of it. A process, notice, order or demand issued by the department shall be served by being mailed by the commissioner or any of his staff by registered or certified mail addressed to the offeror at his latest address on file.

Sec. 45.57.100. REGULATIONS. The department may make and adopt regulations, and adopt forms, that are necessary or desirable to carry out the provisions of this chapter.

Sec. 45.57.110. DEFINITIONS. As used in this chapter, unless the context requires otherwise,

(1) "department" means the Department of Commerce and Economic Development;

(2) "exempt offer" means, with respect to any class of equity securities of the offeree company,

(A) an isolated offer to purchase equity securities from individual shareholders and not made to shareholders generally;

(B) an offer made by an issuer to purchase its own equity securities or equity securities of a subsidiary at least two-thirds of the voting stock of which is owned beneficially by the issuer;

(C) an offer to purchase equity securities to be effected by a registered broker-dealer on a stock exchange or in the over-the-counter market if the broker performs only the customary broker's function, and receives no more than the customary broker's commissions, and neither the principal nor the broker solicits or arranges for the solicitation of orders to sell equity securities of the offeree company;

(D) an offer to purchase equity securities made to all holders of the securities if the number of such holders does not exceed 100 at the time of the offer;

(E) an offer which the board of directors of the offeree company recommends to the security holders of the company if the terms of the offer, including any inducements to officers or directors which are not available to all security holders, have been furnished to security holders;

(3) "offeree" means a person, whether a security holder of record or a beneficial owner, to whom a takeover bid is made;

(4) "offeree company" means a corporation incorporated under the laws of Alaska or a corporation which has its principal office and substantial assets located in Alaska, whose equity securities are the subject of a takeover bid;

(5) "offeror" means a person who makes a takeover bid, and includes two or more persons

(A) whose takeover bids are made jointly or in concert, or

(B) who intend to exercise jointly or in concert any voting rights attaching to the equity securities for which a takeover bid is made;

(6) "offeror's presently owned equity securities" means, with

respect to any class of securities of an offeree company, the aggregate number of shares or other units which, on the date of a takeover bid, are beneficially owned or subject to a right of acquisition directly or indirectly by the offeror or an associate of the offeror;

(7) "associate of the offeror" means

(A) a corporation or other organization of which the offeror is an officer, director or partner, or is, directly or indirectly, the beneficial owner of 10 per cent or more of any class of equity securities;

(B) a person who is, directly or indirectly, the beneficial owner of 10 per cent or more of any class of equity securities of the offeror;

(C) a trust or other estate in which the offeror has a substantial beneficial interest or as to which the offeror serves as trustee or in a similar fiduciary capacity;

(D) a relative or spouse of the offeror or a relative of the spouse, who has the same home as the offeror;

(E) a person directly or indirectly controlling, controlled by, or under common control with, the offeror;

(8) "takeover bid" means an offer, other than an exempt offer;

(9) "offer" means an offer made by any person directly or through an agent by advertisement or any other written or oral communication to offerees to purchase the number of shares or other units of any class of equity security of the offeree company that, together with the offeror's presently owned shares, will in the aggregate exceed five per cent of the outstanding shares of that class;

(10) "Securities Exchange Act of 1934" means the federal statutes of that name as in effect or subsequently amended.

Sec. 45.57.120. SHORT TITLE. This chapter may be cited as the Takeover Bid Disclosure Act.

changes for HCS Victor 5/6

Original sponsor: Commerce Committee

Offered: 3/24/76
Referred: Rules

IN THE SENATE BY THE COMMERCE COMMITTEE

CS FOR SENATE BILL NO. 443

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINTH LEGISLATURE - SECOND SESSION

A BILL

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offeror shall pay the increased consideration to each offeree whose securities are taken up even if they have been taken up and paid for before the variation of the takeover bid.

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(b) A hearing shall begin within 20 days of the date of filing of the statement and adjudication shall be made within 30 days of the filing unless extended by the department for the convenience of the parties or protection of the offerees.

(c) The statement to be filed with the department under (a) of this section shall include the following information and the additional information that the department may require as necessary in the public interest or for the protection of offerees:

(1) the name, address and business experience of the offeror and each associate of the offeror;

(2) the terms and conditions of the takeover bid, which shall include the applicable provisions of sec. 10 of this chapter;

(3) the source and amount of the funds or other consideration

used or to be used in making the takeover bid, and if any part of those funds or consideration is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of making the bid, a description of the transaction and the names of the parties to it, except that if a source of funds is a loan made in the ordinary course of business by a bank or financial institution customarily engaged in the business of making loans, it will be sufficient to so state;

(4) plans or proposals that the offeror may have to liquidate the offeree company, to sell its assets to or merge it with any other person, or to make any other material change in its business or corporate structure;

(5) the number of shares or other units of securities of each class presently owned by the offeror and each associate of the offeror;

(6) information as to any contracts, arrangements, or understandings with a person with respect to securities of the offeree company, 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 those contracts, arrangements, or understandings have been entered into, and giving the details of them;

(7) complete information on the organization and operations of the offeror, including without limitation the year of organization, form of organization, jurisdiction in which it is organized, a description of each class of the offeror's capital stock and of its long-term debt, financial statements for the current period and for the three most recent annual accounting periods, a brief description of the location and general character of the principal physical properties of the

offeror and its subsidiaries, a description of pending legal proceedings other than routine litigation to which the offeror or any of its subsidiaries is a party or of which any of their property is the subject, a brief description of the business done and projected by the offeror and its subsidiaries and the general development of that business over the past five years, the names of all directors and executive officers together with biographical summaries of each for the preceding five years to date, the approximate amount of any material interest, direct or indirect, of any of the directors or officers in a material transaction during the past three years or in a proposed material transaction to which the offeror or any of its subsidiaries was or is to be a party, and complete information concerning all inducements to officers and directors of the offeree company which are not made available to all security holders.

(d) The department may within 10 days of the filing order a hearing to determine whether fair, full and effective disclosure is proposed, if in the opinion of the department cause for a hearing exists. The offeree company may within 10 days of the filing request a hearing and the department shall upon receipt of the request order a hearing.

(e) All written soliciting material used by the offeror in connection with the takeover bid shall be filed with the department and the registered agent of the offeree company not later than three days before the time copies of the material are first published or sent or given to offerees.

(f) If, under an arrangement or understanding with the offeror, any persons are to be elected or designated as directors of the offeree company, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the offeree company, then, before the time that person

takes office as a director, the offeror shall file with the department, and transmit to all holders of record of securities of the offeree company who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by sec. 14(a) or 14(c) of the Securities Exchange Act of 1934 to be transmitted if the person was a nominee for election as a director at a meeting of the security holders.

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Sec. 45.57.040. DECEPTIVE PRACTICES. It is unlawful for a person to make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in a fraudulent, deceptive, or manipulative act or practice, in connection with a takeover bid, or a solicitation of offerees in opposition to or in favor of a takeover bid.

Sec. 45.57.050. INVESTIGATIONS AND SUBPOENAS. (a) The department in its discretion may

(1) make public or private investigations inside or outside this state as it considers necessary to determine whether a person has violated or is about to violate a provision of this chapter or an order under this chapter, or to aid in the enforcement of this chapter or in the prescribing of forms under this chapter;

(2) require or permit a person to file a statement in writing under oath or otherwise as the department determines, as to all the facts and circumstances concerning the matter to be investigated; and

(3) publish information concerning a violation of this chapter or an order under this chapter.

(b) For the purpose of an investigation or proceeding under this chapter, the department or an officer designated by it may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of books, papers, correspondence, memoranda, agreements, or other documents or records which the department considers relevant or material to the inquiry.

* [(c) In case of contumacy by, or refusal to obey a subpoena issued to a person, the superior court, upon application by the department, may issue to the person an order requiring him to appear before the department, or the officer designated by it, to produce documentary evidence if so ordered or to give evidence touching the matter under investigation or in question. Failure to obey the order of the court may be punished by the court as a contempt of court.]

deleted

[(d) No person is excused from attending and testifying or from producing a document or record before the department, or in obedience to the subpoena of the department or officer designated by it, or in a proceeding instituted by the department, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. However, no individual may be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter, or thing concerning which he is compelled, after claiming his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed in testifying.]

Sec. 45.57.060. INJUNCTIONS. When it appears to the department that a person has engaged or is about to engage in an act or practice in

violation of a provision of this chapter or an order under this chapter, it may bring an action in the superior court to enjoin the acts or practices and to enforce compliance with this chapter or order under this chapter. [Upon a proper showing, the appropriate remedy shall be granted.] The court may not require the department to post a bond.

* Sec. 45.57.070. CRIMINAL PENALTIES. A person who wilfully violates a provision of this chapter, upon conviction, is punishable by a fine of not [less than $100 nor] more than $5,000, or by imprisonment for not [less than 30 days nor] more than three years, or by both. However, no person may be imprisoned for the violation of an order if he proves that he had no knowledge of the order. No indictment or information may be returned under this chapter more than two years after the alleged violation.

delete

* Sec. 45.57.080. CIVIL LIABILITIES. (a) An offeror who (1) makes a takeover bid which does not comply with the provisions of this chapter or (2) makes a takeover bid by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading (the offeree not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to any offeree whose shares are taken up under the takeover bid who may bring civil action (A) to recover the shares, together with all dividends received, costs and reasonable attorney fees, upon the tender of the consideration received from the offeror, or (B) for the substantial equivalent in damages if the offeror no longer owns the shares.

change of wording

(b) Every person who materially participates or aids in a takeover bid made by an offeror liable under (a) of this section, or who

directly or indirectly controls an offeror who is liable, is also liable jointly and severally with and to the same extent as the offeror unless the person who so participates, aids or controls, sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There shall be contribution as in cases of contract among the several persons liable.

(c) A tender specified in this section may be made at any time before entry of judgment.

(d) No person may bring action under this section unless brought within two years after the transaction upon which it is based. If a person liable under this section makes a written offer, before suit is brought, to return the shares taken up under the takeover bid together with all dividends received, upon the tender of the consideration received from the offeror, or to pay damages if the offeror no longer owns the shares, no person may maintain a suit under this section unless he rejected the offer in writing within 30 days of its receipt.

(e) Any condition, stipulation or provision binding an offeree to waive compliance with a provision of this chapter or a regulation issued under it is void.

(f) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

Sec. 45.57.090. CONSENT TO SERVICE OF PROCESS. A nonresident offeror, except a foreign corporation which has complied with AS 10.05.-597 - 10.05.696, who makes a takeover bid is considered to have appointed the commissioner of commerce and economic development as his agent upon whom may be served, in any matter arising under this chapter, any process, notice, order or demand except one issued by the depart-

ment. Service may be made on the commissioner or any of his staff at his office. He shall send it by registered or certified mail addressed to the offeror at his latest address on file and keep a record of it. A process, notice, order or demand issued by the department shall be served by being mailed by the commissioner or any of his staff by registered or certified mail addressed to the offeror at his latest address on file.

Sec. 45.57.100. REGULATIONS. The department may make and adopt regulations, and adopt forms, that are necessary or desirable to carry out the provisions of this chapter.

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(1) "department" means the Department of Commerce and Economic Development;

(2) "exempt offer" means, with respect to any class of equity securities of the offeree company,

(A) an isolated offer to purchase equity securities from individual shareholders and not made to shareholders generally;

(B) an offer made by an issuer to purchase its own equity securities or equity securities of a subsidiary at least two-thirds of the voting stock of which is owned beneficially by the issuer;

(C) an offer to purchase equity securities to be effected by a registered broker-dealer on a stock exchange or in the over-the-counter market if the broker performs only the customary broker's function, and receives no more than the customary broker's commissions, and neither the principal nor the broker solicits or arranges for the solicitation of orders to sell equity securities of the offeree company;

(D) an offer to purchase equity securities made to all holders of the securities if the number of such holders does not exceed 100 at the time of the offer;

(E) an offer which the board of directors of the offeree company recommends to the security holders of the company if the terms of the offer, including any inducements to officers or directors which are not available to all security holders, have been furnished to security holders;

(3) "offeree" means a person, whether a security holder of record or a beneficial owner, to whom a takeover bid is made;

(4) "offeree company" means a corporation incorporated under the laws of Alaska or a corporation which has its principal office and substantial assets located in Alaska, whose equity securities are the subject of a takeover bid;

(5) "offeror" means a person who makes a takeover bid, and includes two or more persons

(A) whose takeover bids are made jointly or in concert, or

(B) who intend to exercise jointly or in concert any voting rights attaching to the equity securities for which a takeover bid is made;

(6) "offeror's presently owned equity securities" means, with respect to any class of securities of an offeree company, the aggregate number of shares or other units which, on the date of a takeover bid, are beneficially owned or subject to a right of acquisition directly or indirectly by the offeror or an associate of the offeror;

(7) "associate of the offeror" means

(A) a corporation or other organization of which the offeror is an officer, director or partner, or is, directly or

indirectly, the beneficial owner of 10 per cent or more of any class of equity securities;

(B) a person who is, directly or indirectly, the beneficial owner of 10 per cent or more of any class of equity securities of the offeror;

(C) a trust or other estate in which the offeror has a substantial beneficial interest or as to which the offeror serves as trustee or in a similar fiduciary capacity;

(D) a relative or spouse of the offeror or a relative of the spouse, who has the same home as the offeror;

(E) a person directly or indirectly controlling, controlled by, or under common control with, the offeror;

(8) "takeover bid" means an offer, other than an exempt offer;

(9) "offer" means an offer made by any person directly or through an agent by advertisement or any other written or oral communication to offerees to purchase the number of shares or other units of any class of equity security of the offeree company that, together with the offeror's presently owned shares, will in the aggregate exceed five per cent of the outstanding shares of that class;

(10) "Securities Exchange Act of 1934" means the federal statutes of that name as in effect or subsequently amended.

Sec. 45.57.120. SHORT TITLE. This chapter may be cited as the Takeover Bid Disclosure Act.

HCS CSSB 443 IS A BILL DESIGNED FOR THE PROTECTION AND BENEFIT OF STOCKHOLDERS OF ALASKAN CORPORATIONS OR CORPORATIONS WHICH HAVE THEIR PRINCIPAL OFFICE AND SUBSTANTIAL ASSETS IN ALASKA. AS LONG AS MOST STOCKS SELL BELOW THEIR BOOK VALUE AND AT LOW EARNINGS MULTIPLES, RAIDING COMPANIES WILL CONTINUE TO MAKE TAKE-OVER BIDS FOR OTHER COMPANIES.

THIS BILL PROVIDES THAT NO PERSON CAN MAKE AN OFFER TO GAIN CONTROL OF AN ALASKAN CORPORATION BY PURCHASING ITS STOCK WITHOUT COMPLIANCE WITH THE TERMS FOR THE STATUTE. THE RAIDING COMPANY WILL BE REQUIRED TO FILE A DISCLOSURE STATEMENT WITH THE DEPARTMENT OF COMMERCE, THE TARGET COMPANY AND THE STOCKHOLDERS. INFORMATION REQUIRED TO BE DISCLOSED IS SET FORTH HEREIN BEGINNING ON PAGE 2, LINE 22 WITH THE DEPARTMENT OF COMMERCE AUTHORIZED TO REQUIRE FURTHER INFORMATION IF IT DEEMS NECESSARY FOR PROTECTION OF THE STOCKHOLDERS. THE BILL ESTABLISHES A MINIMUM TIME PERIOD OF 21 DAYS WHICH THE OFFER MUST REMAIN OPEN TO STOCKHOLDERS.

THE EFFECT OF THIS BILL IS TO MAKE IT MORE DIFFICULT FOR A RAIDER TO GAIN CONTROL OF AN ALASKAN CORPORATION IN WAYS WHICH WOULD BE UNFAIR TO STOCKHOLDERS. IRRESPECTIVE OF WHETHER A STOCKHOLDER CHOOSES TO SELL TO THE RAIDER AT A PREMIUM PRICE OR HOLD HIS STOCK, HE WILL ACQUIRE THE NECESSARY INFORMATION, UNDER THE PROVISIONS OF THIS BILL, WHICH WILL ENABLE HIM TO MAKE HIS OWN DECISION WITHOUT BEING STAMPEDED BY THE RAIDING COMPANY.

SIMILAR STATUTES HAVE BEEN ENACTED BY THE STATES OF COLORADO, HAWAII, IDAHO, INDIANA, KANSAS, MINNESOTA, NEVADA, OHIO, PENNSYLVANIA, SOUTH DAKOTA, ~~AND~~ VIRGINIA and earlier this month, Delaware.

CONNECTICUT, ~~DELAWARE~~, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW JERSEY, AND TENNESSEE ARE PRESENTLY CONSIDERING THIS LEGISLATION.

PERHAPS THE CONCLUDING PARAGRAPH OF A RECENT ARTICLE IN FORBES MAGAZINE ENTITLED "RUTHLESSNESS BY THE RULES" BEST SUMS UP THE NEED FOR THIS BILL AND I QUOTE:

> " THE IMPORTANT THING IS TO TIGHTEN THE RULES -- AND EXTEND THE BIDDING PERIOD SO THAT STOCKHOLDERS WON'T BE PANICKED INTO SELLING OUT TO ARBITRAGEURS AT THE FIRST OFFER. IF THE STOCKHOLDERS STAY COOL AND ARE ABLE TO WAIT, THERE ARE ALMOST CERTAIN TO BE HIGHER BIDS."

I URGE THE PASSAGE OF THIS BILL.

Williams Act SEC

what Co. does this apply to — what portion in state
what level of Co by Williams Act

Why stockholders railroaded

what prompted the bill

Why 100 share holder cutoff

TELEGRAM

...CA ALASKA COMMUNICATIONS, INC.
PHONE: 586-6440
JUNEAU, ALASKA 99801

02119 NL ANCHORAGE ALASKA 96 04-12 457P AST

PMS TERRY GARDINER 2234

CHAIRMAN HOUSE JUDICIAL COMMITTEE

STATE OF ALASKA JUN

UNDERSTAND YOUR COMMITTEE CONSIDERING SB 443 SOMETIMES REFERRED TO AS A CORPORATE TAKE-OVER BILL. IN VIEW OF THE STATES APPARENT BAD REPUTATION WITH THE FINANCIAL WORLD AT THE MOMENT WIEN FINDS ITSELF IN THE POSITION OF ITS STOCK SELLING AT SUBSTANTIALLY LOWER THAN ITS BOOK VALUE AND CRITICALLY BELOW ITS LIQUIDATION VALUE. IT APPEARS THAT SB 443 WOULD BE ADVANTAGEOUS TO THE PEOPLE OF ALASKA WHOSE AIRLINE GOULD BE SUBJECTED TO FALLING INTO HANDS NOT COMPATIBLE WITH THE BEST INTERESTS OF THE STATE OF ALASKA. MY COMPANY SUPPORTS THIS BILL.

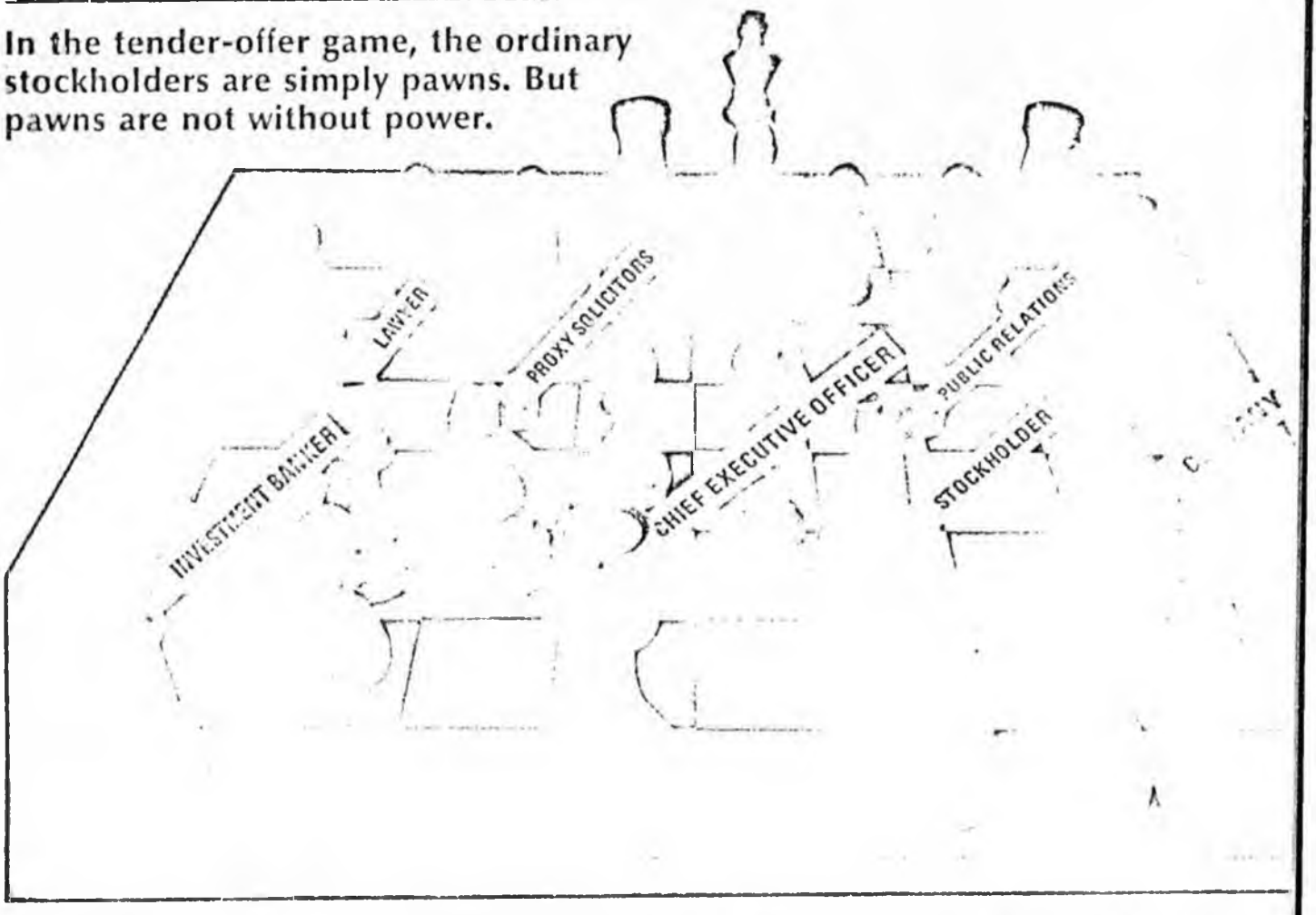
RAY PETERSEN CHAIRMAN OF THE BOARD AND PRESIDENT

WIEN AIR ALASKA INC

1976 APR 12 PM 8 53

Ruthlessness By The Rules

In the tender-offer game, the ordinary stockholders are simply pawns. But pawns are not without power.



CHECKMATE?

Or stalemate?

It looked like certain checkmate for Microdot Inc. when General Cable Corp. launched a powerful takeover gambit in December. General Cable was carefully masterminded by Morgan Stanley & Co. and legal-eagled by Joseph Flom, generally regarded as the smartest takeover lawyer in the country.

The offer looked irresistible. The stock market was doing nothing, and Microdot stock languished around 11. General Cable was offering $17 a share in hard cash. In shrewdest Morgan Stanley fashion, the offer was designed to put Wall Street's professional arbitrageurs into the game on General Cable's side. (The arbitrageurs buy Microdot stock on the open market, hoping to tender to General Cable at a higher price as soon as possible.) And stockbrokers were to be a part of the strategy, too: They were to be offered 15 cents a share—three to four times the normal retail commission—for every Microdot share they were able to persuade customers to part with.

To keep the arbitrageurs happy, Morgan Stanley specified that General Cable would accept every share offered—not just a certain number. In such a fight, the arbitrageurs play the key role: Once a big part of the stock is in their hands, the game is almost over. They are interested only in getting out at a profit, and getting out as soon as possible. Who can take them out quickly except the acquiring company?

Beautiful Ohio . . .

There was only one hitch—and it may prove to be a fatal hitch for General Cable's strategy. Microdot happens to have large assets in Ohio, which has one of the toughest anti-takeover laws in the Union. Under Ohio laws, the General Cable tender offer has not yet been approved by the State Securities Commissioner. So far, therefore, the tender has not become effective—though some arbitrageurs have already gone into action as though it had.

Meanwhile, Microdot's chairman, Rudolph Eberstadt Jr., a nephew of the late Wall Street magnate Ferdinand Eberstadt, has been busy moving his own pieces about the board. He has used every gambit in the book and some not yet in the book. He has attacked General Cable's management, questioned Morgan Stanley's motives and last month made a novel move that may well become a defensive classic in the tender game: He proposed that his board of directors be given the power to liquidate Microdot rather than surrender—that is, sell the assets, piecemeal if necessary, to other companies. Such a liquidation could bring at least $27 a share, more than half again as much as General Cable proposes offering. Eberstadt says he even considered tendering for the tenderer. In the end, however, he decided against the move: "General Cable just isn't worth

it," he says. "Maybe I should take out an advertisement offering $3 a share [the stock sells for $10]; that would show my contempt for them."

Eberstadt has a point. A ho-hum kind of company making wire and cable, General Cable has had a lackluster earnings record. Microdot, a diversified maker of industrial supplies, by contrast, has shown considerable growth. For example, Microdot's common book value has more than trebled in the past decade. General Cable's has increased by only about one-fourth as much. A takeover of Microdot would give Cable some badly needed glamour. Financed with money borrowed from four banks, including Microdot's own lead bank, Irving Trust, the takeover would be highly leveraged and bring quick, substantial gains in earnings per share for General Cable.

Defensive fights like the one Microdot is waging are making it more difficult and costly to take over companies that do not want to be taken over. In spite of the sick stock market last year, according to figures prepared by the Chicago merger consultant W.T. Grimm & Co., there were fewer tender offers for publicly held companies than in 1974. The score: 76 vs. 58. But, as long as most stocks sell below book value and at low earnings multiples, the tender game will go on. The cost may be high, but the potential rewards are tremendous.

In fact, the fights are getting more vicious all the time. Raids are being made when rival presidents are out of the country or even ill.

Consider this tactic, now fairly standard: Shortly before closing time on a Friday, the tendering company's lawyer appears at the Securities & Exchange Commission with a copy of the required Schedule 13D form, which includes information about the offerer and his intentions. Ads are placed in *The New York Times* and *The Wall Street Journal* for publication Monday morning. The raid is still secret. On Monday morning, the target company receives a copy of the 13D along with newspaper stories announcing the offer. The offer may give shareholders as few as seven days (including weekends and holidays) to consider the offer.

In consideration for the interests of the arbitrageurs—nobody seems to worry much about the stockholders who tender—investment bankers have developed a new technique. Follow a low initial bid with a second higher one. The early arbitrageurs who acted on the first bid thus get a double reward. (There have even been suggestions that some arbitrageurs have been given advance information on takeovers.)

It is important for the aggressor that he strike with great power and confidence: He needs the arbitrageurs, and they must be convinced that the raid will succeed. There is nothing worse for an arbitrageur than to pay a premium over market for a stock and then have the tender offer collapse. The arbitrageurs can't afford risk and they can't afford delays. As one of them puts it, "Five percent profit in one week is a 260% annual rate; 5% in a month is only 60%." And there are risks: Many arbitrageurs got bloodied last November when they bought Austral Oil at 17 to sell to St. Joe Minerals for stock worth 20. The deal was called off, and many arbitrageurs ended up selling their shares for as little as $11. Good-bye to many months' profits!

Arbitrageurs are nervy, hard-to-scare types; some are lawyers who instinctively know if a highly publicized lawsuit has any chance of success or is just a smoke screen. The best are right as often as 19 out of 20 times. But if they see a deal becoming really tainted, they will not hesitate to dump their stock on the open market.

A Quick Kill?

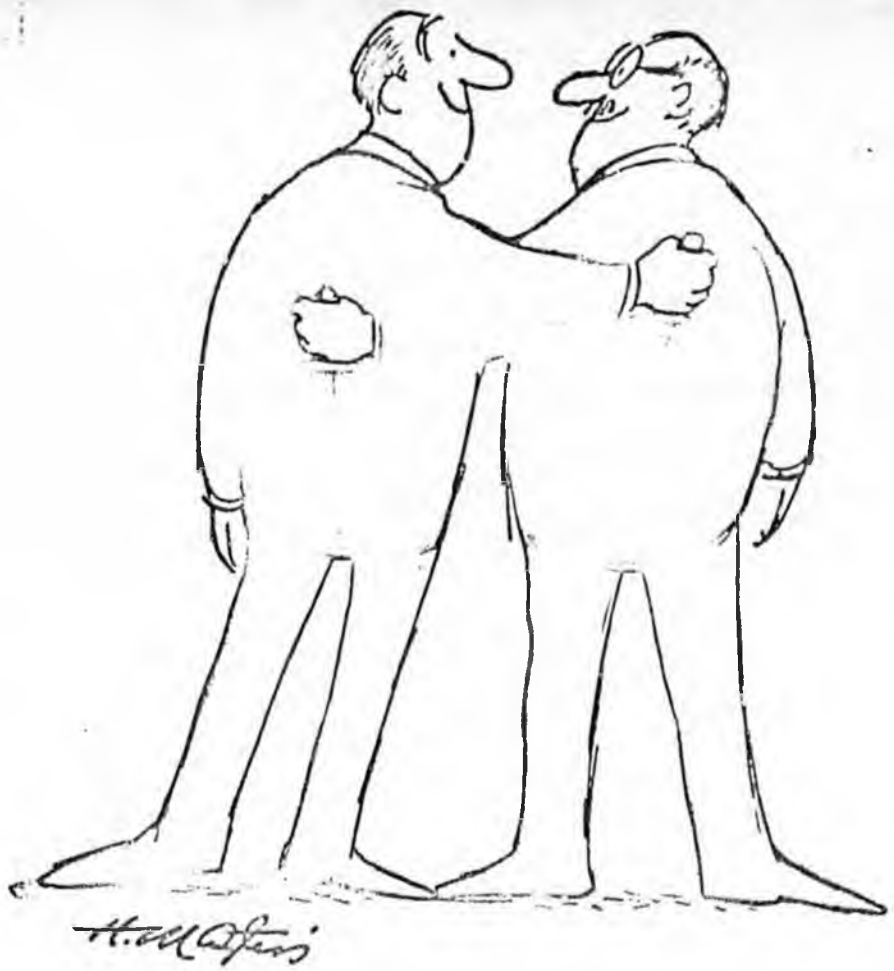
It is also important to strike with vigor so that the stockholders won't be encouraged to hold out for a higher price; every share tendered at a low price makes the final acquisition that much cheaper. It is also tougher for a rival bidder if the first bidder already has a good-sized block of stock in his pocket.

When a tender offer does not succeed at first stroke, the resulting bidding can be very costly for the bidders, but very advantageous for the shareholders of the acquired company. Take the 1974 takeover of ESB Inc. by International Nickel. ESB was at 19. Inco offered $28 a share, a nice premium. However, ESB had previously talked merger with another company, United Technologies (formerly United Aircraft). UT knew that ESB was worth a good deal more than $28 a share. So UT made a rival offer of $31. In the end, Inco topped the UT offering at $41 a share. As a result of UT's rival offer, ESB stockholders came out a full 46% better than they otherwise would have. Inco, moreover, seemed glad to have won ESB even at the higher price (although the Justice Department's Antitrust Division is now pressing a suit to force Inco's divestiture of ESB). But in how many takeovers do stockholders get this kind of a price break?

More recently, Mesa Petroleum bid $22 a share for control of Aztec Oil—nearly 50% over market. But the Mesa bid attracted other bidders and Mesa dropped out. The bidding for Aztec is up to $32 a share, and Aztec stockholders will get a real windfall.

For such reasons, companies will go to great lengths to keep away raiders. Thomas Mellon Evans, chairman of H K Porter Co. as well as Condec Co., has played the takeover game for 25 years. He deliberately cultivates a tough-guy image to overawe both his targets and potential raiders. In bidding recently for control of Missouri Portland Cement Co., on behalf of his H K Porter Co., Evans

Rudolph Eberstadt Jr. is clearly outraged at General Cable's attempt to take over his company, Microdot. But here Eberstadt is displaying a short memory: Only a few years ago he himself tried—unsuccessfully—to mount an unfriendly tender offer for a small company named Teco.



"What! Me make an unfriendly tender!"

found himself facing a potential rival bid from Chromalloy American Corp. Evans ran into Chromalloy's Chairman Joseph Friedman, who remarked that he hoped there would be no hard feelings over Chromalloy's designs on H.K. Porter's quarry. Evans reply made it quite clear that there would be considerable hard feelings. He went on to point out that Chromalloy was heavily in debt while his H.K. Porter wasn't, and that this and similar comparisons would have to be made if a fight developed. "These things get rather bloody, you know," Evans told Friedman. Chromalloy called off its proposed merger with Missouri Portland, and Porter has acquired 52% of Portland's stock.

Lawyer David Hall of Demas & Hall, which specializes in tender work, claims he knows two cases where raiders maneuvered so they could scotch a competing tender bid. The first was when a raider used detectives to uncover damaging financial facts about its potential rival, and then warned the rival that that material would have to be disclosed in the event of two competing tenders. Currently, one of Hall's clients has been threatened with a tender offer if it refuses to sell a prize division for a ridiculously low price.

It's quite obvious that this is no gentlemanly game, and the successful defender is often at least as ruthless as his attacker. One of the more successful defenders in proxy battles is Richard Cheney, 51, executive vice president at the big public relations firm of Hill & Knowlton. Cheney is well known for his successful defenses of such companies as Dictaphone and Goodrich, but Cheney has dropped a few, too. Only recently he lost a client, Garlock Inc., to Colt Industries, in a surprise attack that Garlock didn't have time to resist, though other bidders were interested. Cheney helped Goodrich fight off raider Ben Heineman of Northwest Industries. He had Goodrich take out full-page advertisements criticizing the way Northwest was running its own business and implying that Heineman would be a very poor doctor for what ailed Goodrich. In addition, Goodrich deliberately bought a small trucking company in order to raise the antitrust issue for Northwest, which at that time owned the Chicago & North Western Railway.

Another successful Cheney defense involved Dictaphone Corp. against a takeover bid from Canada's Northern Electric Co., Ltd. The defense involved publicizing pre-tender trading by the wife of Northern Chairman John Lobb. Cheney also made sure every Dictaphone employee knew that there had been a good deal of firing at Northern Electric after Lobb took over. This, not surprisingly, got Dictaphone's union riled up. The union saw to it that Connecticut Senator Lowell Weicker attacked this "foreign takeover" of a Connecticut company. The clincher was an antitrust charge involving Northern's parent, Bell of Canada.

In the end, Northern Electric broke off the attack. Dictaphone was "saved." But there is a postscript: Management's defense prevented stockholders from selling out at $12 a share; but Dictaphone stock recently sold at 9.

Another veteran tender-defender is Manning Selvage & Lee Chairman Morris Lee, who goes back to Sewell Avery's successful defense against raider Louis Wolfson in the mid-Fifties. Lee likes to try stopping tenders before they are made. Lee says he stopped one group of raiding Texans by exposing a lie they had told their financiers, thereby killing their loan.

One of the most successful defenses was engineered in 1974 by California-based Signal Cos. This $1.6-billion conglomerate was under attack by a group of investors including the Bronfman interests in Distillers Corp.-Seagrams Ltd. Signal's management figured out that the Bronfmans hoped to sell Signal's Mack Trucks and Garrett Corp. and end up owning Signal's oil and gas operations for free. By the time the raiders had 10% of Signal stock, Signal turned around and sold the oil and gas to Britain's Burmah Oil and used part of the proceeds to buy out the would-be raiders.

The Signal story has an ironic twist: The oil and gas operations proved

The Middle Men

CONVENTIONAL arbitrage is almost riskless, involving simultaneous buying and selling. But arbitrage as practiced in the tender game is far from riskless. It involves buying a stock at a higher price than it recently sold, if the tender offer falls through, the stock may drop back and the arbitrageur may get clobbered. A few such clobberings and he is out of business. The game is only for a few tough, experienced men, but they get very rich turning their money over every few weeks if they are lucky. The biggest arbitrageur is probably Leonard Sheriff, 60, a Yale Law School graduate who operates his own firm. Among brokers, Goldman, Sachs, Bache & Co., Bear, Stearns are big.

disappointment to Burmah, which in effect was driven to the wall by that purchase. Burmah has been trying unsuccessfully to sell the former Signal properties ever since, while Signal, by contrast, is now cash-rich and raider-free.

The Goodrich ploy of buying a trucking company to block takeover by a railroad has been used many times. In one case, an Iranian tender was discouraged because some of coal producer Pittston's subsidiaries were regulated by the Interstate Commerce Commission. GAF Corp. is purchasing a radio station, apparently to make it difficult for outsiders to try taking it over; U.S. law requires unusually close scrutiny of broadcast company ownership.

Anaconda Co., under assault from Tom Evans and Crane, used the same tactic. It bought the Walworth Co., a competitor of Crane. This raised probably insuperable antitrust obstacles to a Crane takeover of Anaconda. In the end Evans settled for going after no more than 5 million shares, about 23% of the company, but he agreed not to buy any more shares and not to seek representation on the Anaconda board. (Evans-watchers are betting that this stalemate will not last indefinitely.)

A Local Issue

The stakes are huge in these battles, and, not surprisingly, as fast as defenders of the *status quo* set up obstacles to takeovers, the attackers find ways around them. For a long time it was in vogue to have staggered elections to the boards of directors of companies worried about takeover; the aggressor might get most of the stock, but he still couldn't control the board for many years. But the takeover forces have found ways of forcing resignations from the board. Or of increasing the board's size. Or of weakening its powers. So managements have come up with a new defense. First undertaken by Chicago Pneumatic Tool Co., it involves protecting minority shareholders by requiring a 95% stockholder vote in favor of a merger—unless the attacker comes up with an offer for all the outstanding stock that meets certain preset requirements.

Frequently the strongest resistance to takeovers comes from communities where offices and plants of the target companies are located. For this reason, some state laws against takeover are much tougher than the federal laws. "Without the protection of the Ohio law, we'd be dead now," says Allen Howell, financial assistant to the president of Microdot. "We wouldn't have had time to toss up this de-

fense." The Ohio law provides for "full and fair disclosure" before a tender can be made. The state laws may not hold up, however, since their constitutionality has been challenged on grounds that they abridge the Federal Government's power to regulate interstate commerce. If the state laws fall, pressure for tougher federal laws will probably follow.

Whose Interest?

When a management resists a takeover bid, it never fails to announce: "This offer is not in our stockholders best interests." Is this just so much cant? In many cases, yes: It may not previously have bothered the management that its stockholders had become stockholders, or at least it didn't bother them sufficiently to do much about it.

To be sure, takeover types are not philanthropists. They want assets at a discount. Or they want companies on the verge of a turnaround where the stock price does not yet reflect the potential. If they pay $15 for a stock that recently sold at $10, it is only because they think it will be worth $20 or $25 or $30 within a reasonable amount of time.

For example, Tom Evans bought CF&I Steel in 1969 for a package of securities and cash with a market value of around $100 million; in 1974 the steel properties earned $35 million, a 35% return. Of course, Evans had to wait for the steel business to pick up before he did that well, but he waited with a confidence and a sense of control that the ordinary shareholder can never have.

From a businessman's point of view—as opposed to that of an investor—a tender offer can be a cheap way of expanding. Through tenders, Tesoro Petroleum recently bought control of Commonwealth Oil Refining for $82 million: Commonwealth's properties had a book value of only $300 million and a probable replacement cost of over $800 million.

If the businessman has incentives that the ordinary investor does not, so do the investment bankers.

If General Cable wins Microdot, then Morgan Stanley stands to earn an $800,000 fee. Tenders are good pickings for the banks, too: safe loans with fast pay-back. These loans are so tempting that New York's Irving Trust Co. may have gotten into a conflict-of-interest situation. While doing business with Microdot (and receiving regular reports on the company), Irving agreed to serve as lead bank for General Cable in financing the proposed takeover of Microdot. The bank denies there was any conflict, but Microdot's Eberstadt insists there was and announced he plans to sue Irving Trust.

A Useful Alternative

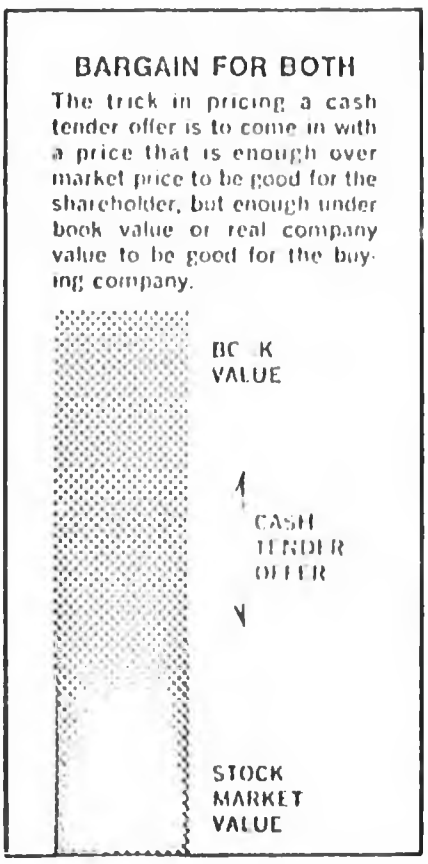
Men like Tom Evans argue that these tender offers play a useful role in keeping the economic system efficient. Even allowing for his obvious self-interest, Evans clearly has a point. Many managements are inefficient, and the country is better off if scarce capital is taken out of their hands. Too many other managements treat their stockholders in a cavalier fashion, considering them the last and the least of the publics they have to deal with. Seeing their money mishandled and their own interests largely ignored, many investors have turned away in anger from the stock market. Taking them out of depressed stocks through tender offers may not be the ideal way to restore their confidence, but at least it gives them an alternative to selling at a distressed price in a disinterested market.

An executive engaged in selling one of his company's plants to another company tells this story. Playfully, the buyer twitted the seller: "You know, on a tender I could buy your whole company for the price of this plant." The seller winced, because he knew it was true.

As long as it is true for literally hundreds of good companies, the tender game will go on. As long as the game threatens established managements, the managements will fight the tenders tooth and nail.

The important thing is to tighten the rules—and extend the bidding period so that stockholders won't be panicked into selling out to arbitrageurs at the first offer. If the stockholders stay cool and are able to wait, there are almost certain to be higher bids.

As for the stockholder's real interest, it is neither with attacker nor with victim. His interest is in getting the best possible price for his property. ●



BARGAIN FOR BOTH

The trick in pricing a cash tender offer is to come in with a price that is enough over market price to be good for the shareholder, but enough under book value or real company value to be good for the buying company.

Thomas Mellon Evans, of Crane Co. and H.K. Porter, is one of the country's takeover champions, but even he agrees that some reforms are desirable. For example, he believes that there should be a 60-day "cooling off" period after a takeover bid is initiated instead of just eight days as at present—if only so that the shareholders can have time to evaluate all the bids.

MEMORANDUM IN SUPPORT OF COMMITTEE SUBSTITUTE FOR SENATE BILL 443, THE "TAKE-OVER-BID DISCLOSURE ACT"

I. The Statute's Jurisdiction

Transactions Covered

The provisions of the statute apply to a take-over bid for any class of equity security of an Alaska corporation. A "take-over bid" is defined in Section 45.57.110 (8) and (9) as an offer made "directly or through an agent by advertisement or any other written or oral communication to (the security holders) to purchase "more than 5% of any outstanding class of the Alaska corporation's equity securities.

Only Alaska corporations and their shareholders may claim the benefit of this statute. Section 45.57.110 (4) specifies that the statute applies only to an offer made with respect to the equity securities of a corporation which is either incorporated in this State or which has both its principal office and substantial assets located in this State.

Transactions Exempted

Even if the target of the take-over bid is an Alaska corporation, the statute specifies certain situations in which the bid may proceed without compliance with the terms of the statute. The transactions exempted from the statute's coverage are ones in which the hazards of inequity or non-disclosure in a take-over bid are substantially reduced.

As stated in Section 45.57.110 (9), the statute does not apply if less than 5% of the corporation's equity securities are the subject of the bid. The acquisition of 5% of a corporation's equity securities typically will not carry with it the power to control the corporation, so that the danger of exploitation of the Alaska corporation and its shareholders is largely eliminated. To the extent that tendering security holders are injured in this situation, their remedies in private damage actions provide them relief.

The other exempt take-over bids are set out in Sectic '5.57.110 (2). These transactions involve situations in which any transfer of control of the Alaska corporation would occur only after complete disclosure and in which th' ecurity hol 'ers are at present adequately protected.

Section 45.57.110 (2) (A) exempts an isolated, private offer to purchase equity securities from individual security holders. In those instances where control is transferred in a private transaction with a few shareholders to the injury of the corporation and its remaining shareholders, common law and equitable remedies are available to redress that injury. On the other hand, if the selling shareholder in such a private transaction is injured by the offeror's misrepresentation or nondisclosure, he will have both common law and federal causes of action available to him.

The exemption provided in Section 45.57.110 (2) (B) permits an Alaska corporation to make an offer for its own securities. This section also exempts a corporation's take-over bid for the securities of its Alaska subsidiary if, at the time of the offer, the offeror beneficially owns two-thirds of the subsidiary's voting stock. The Alaska corporation's fiduciary duty to its own security holders provides protection against any unfairness or nondisclosure in connection with the offer. Similarly, the Alaska subsidiary's security holders are protected by the standards to which the offeror must con.orm by virtue of its status as an "insider" and as the subsidiary's controlling stockholder.

The exemption in Section 45.57.110 (2) (C) permits the purchase of the target's equity securities provided that the purchases occur in ordinary brokerage transactions on a stock exchange or in the over-the-counter market without solicitation of orders to sell.

Because of the dynamics of the stock market it is very difficult to acquire control of a company through such ordinary brokers' transactions. The security holders in these transactions would be left to their private remedies.

If made in compliance with the terms of Section 45.57.110 (2) (D) an offer for the shares of a closely held Alaska corporation is exempted from the statute's coverage. The offer must be made to all the security holders of the target corporation and there must not be more than 100 such security holders. When the number of security holders is small, the opportunities for negotiation between the offeror, the target corporation and target security holders are significantly improved. Hence, the risks of nondisclosure are correspondingly diminished.

Finally, under Section 45.57.110 (2) (E) the statute does not apply to offers which are recommended to the security holders by the target Alaska corporation's board of directors. Since the target's board could be charged with responsibility for making adequate inquiry into the business character of the offeror and the terms of the offer, this statute's protective function would be largely duplicative of such investigation. Moreover, the section specifically requires the terms of the recommended offer to be furnished to the security holders and "any inducements to officers and directors which are not made available to all security holders" to be fully disclosed. The disclosure of any inducements to recommend the offer is designed to insure the integrity of the exemption. To the extent that recommendation of the target's directors is consistent with their fiduciary duty to the security holders, those security holders are as fully protected as if the statutory procedure were complied with. However, if the directors have been offered inducements to recommend the offer, the recommendation may be suspect and the disclosure of the inducements should alert the security holders to that possibility. If the recommendation violates the directors' fiduciary duty, the security holders have adequate common law remedies.

II. The Operation of the Statute

Once the statute is found to apply to a take-over bid for an Alaska corporation, the statute imposes three requirements. First, the offer must not be unfair or inequitable to the security holders; second, the terms of the offer must conform to certain provisions in the statute; and third, the offer must contain the prescribed disclosures.

The Provisions Governing the Terms of the Take-over Bid.

Section 45.57.010 contains the provisions which govern the terms of every take-over bid for an Alaska company. These provisions are designed to encourage a rational response by the security holders to the offer and to assure equal treatment among security holders accepting the offer. Section 45.57.010 (1) specifies the minimum and maximum durations of a take-over bid for an Alaska corporation. The offer may not remain open for less than 21 days or longer than 35 days. The minimum duration is necessary to insure that the security holders have ample opportunity to consider the offeror's disclosures in their decision to accept or reject the offer. This minimum duration is necessary since the federal law does not specifically set a minimum duration for a take-over bid, but merely provides that security holders who accept the offer have a right to withdraw their securities for seven days after the commencement of the offer. Conceivably, under federal law, an offer could be of an even shorter duration than seven days, provided the withdrawal rights were not infringed. Unfortunately, the minimum duration of a take-over bid under federal law is inimical to a rational response to the offer, promoting confusion and panic instead. A minimum duration of 21 days for the offer imposes no serious burden on the offeror and greatly encourages a reasoned response to the offer.

On the other hand, the take-over bid should not be permitted to extend over too long a time. Frequently, the offer will generate considerable uncertainty in the stock market. This uncertainty is particularly marked when the offer is for less than all the shares, since in the event of an oversubscription, proration of the securities taken up will occur. The 35-day limit set out in Section 45.57.010.(1) provides sufficient time for the offer to be fully disseminated to the security holders and accepted or rejected by them.

Security holders who accept the offer but reconsider should be provided with a reasonable period in which to withdraw their shares. Section 45.57.010 (2) permits a security holder to withdraw the tendered shares within 21 days after the commencement of the take-over bid. This withdrawal period is significantly longer than the seven-day period provided under federal law. During a withdrawal period as short as that provided by federal law, security holders have no genuine opportunity to reconsider their response to the offer.

Section 45.57.010 (3) insures the equal treatment of security holders who oversubscribe an offer for less than all of a class of a target corporation's equity securities. This section requires the offeror to take up the tendered securities as nearly as possible pro rata according to the number of securities tendered. This section significantly extends and improves the protection otherwise afforded the security holders by federal law, since under federal law an offeror must prorate the oversubscription of the offer for less than all of a class of equity securities only if the oversubscription occurs within ten days of the beginning of the offer or any increase in consideration offered to security holders by the offeror. If the oversubscription occurs later in the offer or such increase, no proration is required and security holders who deposit their securities after the expiration of such ten day period lose the benefit

of proration. Since there is no justification for such a limitation on the right to pro rata treatment in an offer for less than all the equity securities of a class, Section 45.57.010 (3) requires proration of an oversubscription of such an offer, regardless of when the oversubscription occurs.

Security holders who accept an offer should receive any additional consideration subsequently offered by the offeror for securities of the same class. Section 45.57.010 (4) stipulates that an offeror must pay any increased consideration for the target securities to all offerees, even if an offeree's securities were taken up prior to the increase in offered consideration. The reason for this provision is to prevent an offeror from manipulating security holders by increasing the offer price after taking up the securities deposited in response to the prior offer.

Finally, in order to insure full disclosure to offerees Section 45.57.010 (5) requires that an offer sent by mail to the security holders be accompanied by the disclosure statement filed with the Department of Commerce.

The Prescribed Disclosures

Besides regulating certain terms of the offer, the statute prescribes a set of disclosures which the offeror must make about itself and the offer. These disclosures are at the heart of the statute's remedial function. The disclosures are designed to make it possible for the security holders to understand fully the consequences of their decision to accept or reject the offer.

According to Section 45.57.020 (a) the offeror must file the disclosure statement at least 20 days prior to the effective date of the take-over bid. The disclosure statement must be filed with both the Department of Commerce and the target Alaska company. During this 20-day period the company and the Department will be able to examine the disclosure statement to determine whether a hearing must be held on the adequacy of the disclosures.

The disclosures which the offeror must make are set out in Section 45.57.020 (c) The disclosures prescribed by Section 45.57.020 (c) (1)-(6) in large part parallel disclosures already required by federal law. The Alaska statute calls for these disclosures in order to expose them to critical review before the offer commences.

Section 45.57.020 (c) (7) requires the offeror to provide comprehensive information about itself. The offeror must state the form of its organization and the jurisdiction in which it is organized; describe its financial structure and supply financial statements for the three most recent fiscal years; and provide a description of the location and character of its principal physical properties and the properties of its subsidiaries. Similarly, the offeror must reveal any pending legal proceedings of other than a routine nature to which it or any of its subsidiaries is a party; discuss the business in which it and its subsidiaries are engaged or in which they expect to be engaged; and give an account of those business activities for the most recent five years. Finally, the offeror must disclose certain information about its executive officers and directors, including the amount of their material interest in any material transaction during the most recent three years, or in any proposed material transaction, to which the offeror or any of its subsidiaries were or are to be a party.

Security holders need all of this information. A security holder's decision whether to accept the offer may depend on information concerning not only the terms of the offer and the offeror's plans, but also the business character of the offeror. If the security holder rejects the offer, he may find himself in an enterprise controlled by the offeror. The desirability of an investment in such a combined enterprise will depend in part upon the business character of the offeror.

Present federal statutory law regulating cash take-over bids has no analogue for Section 45.57.020 (c) (7). The federal statutes require no disclosures about the offeror itself so long as the target securities are to be purchased for cash. On the other hand, if the offeror intends to exchange its securities for the target company's securities, the federal statutes require a wide range of disclosures about the offeror. This dichotomy in federal law is hard to justify, since even in a cash offer, security holders who reject the offer should have enough information about the offeror to assess the consequences of maintaining their investment.

Although some federal courts have begun to require disclosures about the offeror, the accretion of federal precedent is slow and incomplete. The information called for in Section 45.57.020 (c) (7) is necessary to protect security holders who reject the offer, and this statute is the most expeditious means of requiring an offeror to disclose that information.

III. The Administrative Procedure

The Department of Commerce is the agency principally charged with the implementation and enforcement of this statute. The statute's substantive provisions will be most effectively implemented by administrative action since the Department will develop the expertise necessary to respond efficiently and knowledgeably to the questions arising under the provisions.

The Hearing

All questions about the fairness of the take-over bid or the adequacy of the offeror's disclosures should be resolved before the commencement of the offer. One of the most serious deficiencies of the federal law dealing with take-over bids is that an offeror's misstatements or non-disclosures are exposed during litigation, but after the commencement of the offer. Often the offeror's subsequent disclosure of information is too late and disjointed to be helpful to the target security holders.

In order to insure that the offer is fair, that the offer is made on substantially equal terms to all security holders and that the disclosures are complete at the start of the offer, a hearing procedure is established for the resolution of questions on those issues. Section 45.57.020 (a) (1) provides that within 10 days after the filing of the offeror's disclosure statement, the Department is authorized to order a hearing on questions arising from the proposed take-over bid. Section 45.57.020 (d) provides that the Department may order the hearing on its own motion if the Department finds that cause for such a hearing exists. The Section also provides that the Department must order the hearing if the target Alaska company requests it.

If a hearing is ordered, Section 45.57.020 (b) requires the hearing to be held within 20 days after the filing of the offeror's disclosure statement. This section also requires that the Department adjudicate the questions raised at the hearing within 30 days after the filing of the disclosure statement, unless either the convenience of the parties or the protection of security holders requires a delay of the adjudication. In order for the offer to proceed, Section 45.57.020 (a) (2) requires the Department to find that the offeror has made "fair, full and effective disclosure to offerees of all information material to a decision to accept or reject the offer." The Department has the power under Section 45.57.050 (c) to require the offeror to disclose information in addition to that specifically identified in Section 45.57.020 (c, (1)-(7).

The Department has the power under Section 45.57.050 to undertake investigations within or outside Alaska to determine whether any person has violated or is about to violate any provision of the statute. This broad investigatory power is especially important to the Department's adjudication on the fairness of the offer and the adequacy of the offeror's disclosures.

Section 45.57.060 provides that if the Department finds that the terms of the offer do not comply with the provisions of the statute or that the offeror's disclosures are incomplete, the Department may enjoin the take-over bid.

Rule-Making Power

Both substantial economies of judicial and administrative resources and more effective protection of security holders can be achieved by proscribing offensive practices by rule rather than by attacking them in adjudicative proceedings. As the Department builds its expertise in the analysis of the fairness of offers and the adequacy of the offeror's disclosures, it will be able to advance the statute's purposes by general rules. These rules will benefit prospective offerors by illuminating the statute's provisions. Consequently, the Department is empowered pursuant to Section 45.57.100 "to make and adopt such rules and regulations, and adopt such forms, as are necessary or desirable to carry out the provisions of the statute."

Filings of Solicitation Materials

The statute requires that certain solicitation materials be filed with the Department. Under Section 45.57.020 (e) all written soliciting material used by the offeror in connection with the take-over bid must be filed with the Department at least three days prior to their distribution to the security holders. That section also requires the offeror to file its solicitation materials with the target Alaska company. Under Section 45.57.030 a written solicitation or recommendation to offerees other than by the offeror to accept or reject a take-over bid shall be filed with the Department" at least simultaneously with their publication or distribution to security holders.

IV. Deceptive Practices

Section 45.57.060 specifically prohibits any person from making an untrue statement of a material fact, omitting to state a material fact or engaging in any fraudulent, deceptive of manipulative acts or practices, in connection with any take-over bid or solicitation of offerees to accept or reject the offer.

V. Crimes and Civil Liabilities

Section 45.57.070 imposes criminal penalties upon any person who willfully violates the statute or violates an order of the Department of which he has knowledge. Pursuant to Section 45.57.080 an offeror may, under certain circumstances, incur civil liability to offerees whose shares have been taken up.