NEWS

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549
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FOR RELEASE: 10:00 a.m., Monday, September 18, 1978

KEYNOTE ADDRESS

61st Annual Convention of the North American Securities Administrators Association

An Address by Harold M. Williams, Chairman
Securities and Exchange Commission

Tarpon Springs, Florida
September 18, 1978

I am very pleased to be here today. This Conference provides an invaluable opportunity to renew professional acquaintances and friendships, and to reflect on new ideas and trends in the securities industry. The dialogue between state and federal securities law administrators should materially contribute to the effective implementation of the securities laws and the integrity of the securities markets in this country, and it is my hope that we can, by working together, improve our already substantial record of cooperation and accomplishment.

I want to talk about three subjects today. First, and perhaps most topical, is the subject of tender offer regulation. Second, I would like to give you a brief review of some of the areas in which the Commission has spent and will be spending a considerable portion of its limited resources in the coming years. Finally, I would like to encourage concentration on a joint approach to enforcement matters which I believe will allow us all to be more effective in enforcing securities laws and in providing investor protection.

A. Tender Offers

We have many areas of mutual interest. One which has recently been much in the news, particularly due

to the Fifth Circuit's decision in Great Western United v. Kidwell, is the regulation of tender offers.

Tender offers present challenging issues to both State and Federal regulators. Over the past decade, a two-tiered approach to tender offer regulation has emerged. At the federal tier is the Williams Act. At the state tier are some 36-takeover statutes, 25 of which became effective after January 1976.

I would like to share my personal views with you about these statutes and to propose a framework of cooperation and consultation between state and federal administrators in this area of mutual concern. I do not wish to discuss the validity of these statutes under the supremacy and commerce clauses of the U.S. Constitution and the Williams Act, however, because these are questions which are being considered in Great Western United, and that case is not as yet final. Thus, I will confine my remarks to the aspects of these statutes which I personally find troublesome. My essential concern is that such statutes tend to be overly protective of existing management.

1. The Protectionist Tilt

Among the typical provisions which protect incumbent management are the following:

(i) The jurisdiction of such statutes commonly turns upon the relationship between the target company and the state, rather than on the presence of shareholders in the state;

(ii) Pre-commencement filing of tender offers with the state and contemporaneous transmittal to the target company is required by over 30 states. Some require such filings to be made as long as 60 days before the anticipated commencement of the tender offer;

(iii) Pre-commencement nearing procedures are mandatory in 15 states if requested by the target company;

(iv) Pre-commencement publication of the material items of the tender offer is often required; and

(v) Over 25 statutes provide for exclusion of "friendly" tender offers from their restrictions.

These restrictions on contested tender offers focus on the tenderor, and the efforts by target company management to defend against contested tender offers are not generally subject to similar regulation. Under many statutes, for example, communications to shareholders by the target company are largely unregulated. Thus, while the bidder must provide

extensive disclosure to the state and to shareholders pursuant to explicit requirements in every state statute, only a few states have any specific disclosure requirements regarding communications to shareholders by the target company.

The effect of these statutes is uncertainty and delay, which favor incumbent management to the detriment of a potential bidder. In my view, this protectionist-tilt represents a departure from the neutral system of tender offer regulation envisioned by Congress when it passed the Williams Act.

On the basis of the legislative history and the language of the Act, I think it reasonable to conclude that the primary objective of the Williams Act was to provide investor protection in tender offer situations, rather than to regulate tender offers as an economic phenomenon. Moreover, the Act was intended to be administered in an even-handed way which would neither obstruct nor facilitate tender offers except to the extent necessary to accomplish the purpose of investor protection.

In my view, state statutes which facilitate the defeat of hostile tender offers are inconsistent with this philosophy, and are inherently unfair to the

shareholders of target companies, who are entitled to full disclosure and a fair chance to decide for themselves how best to respond to a bid for their shares.

Moreover, while the Williams Act is neutral on the economic consequences of tender offers, I personally believe the state takeover statutes, in some cases, tend to insulate entrenched but inefficient management in ways which are unjustified by notions of good corporate governance or by economic realities. Especially when combined with defensive charter amendments - such as super-majority voting requirements and staggered election of directors - at some point this insulation impairs the value of a shareholder's investment in his company, both in terms of liquidity and investment merit.

I wish to stress that I am not encouraging hostile tender offers at the expense of incumbent management. I firmly believe that a target company should have a fair and equal opportunity to defend itself and its record when challenged. I believe that incumbent management should have enough sense of security in its job to be able to concentrate on doing it and doing it well. Management should not need to spend its time looking over its shoulder and dreaming up schemes to insulate itself from

attack. At the same time, management is not entitled to build barriers that are so great as to make it immune to the marketplace and to the interests of shareholders.

Finally, I have a great concern that such restrictions, which tilt the nature and process of corporate structure so severely, provide those who advocate basic change another strong argument that all management is interested in is using the system to perpetuate itself.

For similar reasons, I am concerned about the far-reaching impact of state takeover statutes. They allow local concerns which may conflict from state to state to have a significant effect on national investment decisions. They limit a non-resident shareholder's ability to participate in tender offers, and make it difficult for tenderors to comply with diverse and inconsistent local procedural and substantive requirements.

In my opinion, the pro-management tilt and wide-ranging effect of these statutes are undesirable, particularly in view of Congress' purposes and objectives in passing the Williams Act.

2. State Tender Offer Regulation in the Future

While I believe that state takeover statutes, in their present form, are thus undesirable on a number of grounds, I also believe that there may be a meaningful role that states can play in tender offer regulation. I recognize that local concerns have played a significant part in the adoption of takeover statutes. Thus, while the state's role should complement the federal scheme, and not hinder it, a dialogue between the states and the Commission regarding these local concerns may allow the development of a system of tender offer regulation which, to the greatest extent possible, satisfies the legitimate goals of both federal and state regulation.

For example, an analysis of state concerns may be of great assistance to the Commission in its efforts to protect investors under the Williams Act. In the past, contacts between the Commission and state administrators regarding tender offers have been infrequent. In order to promote a greater understanding of mutual problems, the dialogue on this subject should be enhanced, and I welcome your thoughts on how best to do this.

To get the dialogue started, I suggest that we might fruitfully have meetings, to discuss our respective

roles in tender offer regulation, and to see what progress we can make on a complementary approach to the problem. For example, one item on the agenda of such a meeting might be Section 1904(c) of the ALI's proposed Federal Securities Code. I realize that NASAA has declined to express any views on this subsection, and I am here expressing no view of my own on its merit. However, I think that the concept embodied by this provision - that a state may have an interest in regulating tender offers for a target company which has its principal place of business, a majority of its equity shareholders and a majority of its equity shares in the state - is certainly worth discussing. If you have other agenda items to suggest, or any suggestions as to how to make a meeting between us more productive, please let me know.

There are ongoing efforts by the Commission which may also help to resolve some of the concerns that caused states to adopt takeover statutes in the first instance. Some time ago, the Commission published for comment certain rules and schedules related to tender offers. Among these proposals was a provision which would require any tender offer to remain open at least 15 business days from the date the tender offer is first published, sent or given to security holders. If the bidder increases

the consideration offered or the dealer's soliciting fee, the tender offer would be required to remain open for at least ten business days after the date of such increase.

Another proposal would extend the initial withdrawal right of depositing shareholders in certain tender offers from 7 calendar days to 10 business days and would establish a right of withdrawal for any shares which have not been accepted for payment by the bidder during the seven business days following the date of a filing of a competing tender offer.

It would appear that the adoption of these proposals would provide investors increased protection without sacrificing the neutral approach to tender offers envisioned by the Williams Act.

I anticipate that the Commission will be acting on the tender offer proposals in the near future. On behalf of the Commission and its staff, I urge your participation in our continuing efforts in this area. We would be especially interested in the problems which you have seen in tender offer regulation which may lend themselves to, or which may require a national solution. Let us know what the problems are, and which ones will remain after our proposals are adopted, and we may be able

to help.

I am optimistic that we can work together to develop an integrated system of tender offer regulation with which we can all feel comfortable. I hope you share my feelings.

B. A Progress Report on the Commission's Work

Tender offer regulation, of course, is only a part of the Commission's work, albeit an important one. I would like to describe briefly some of the other projects on which the Commission is concentrating its resources, so that you will have a sense of what we are going to be doing over the next few years.

1. The National Market System

In the securities acts amendments of 1975, Congress mandated the Commission to facilitate the establishment of a national market system. Among the objectives of that system are the linking of all markets for so-called "qualified securities" so as to promote the most economical and efficient execution of securities transactions, improve the availability of information, and enhance fair competition among markets and market participants. Last January, the Commission issued a release (No. 34-14416) outlining its current thinking on the components of a national market system. Briefly,

it is our view that six distinct elements are necessary to implement such a system:

(1) a composite quotation system; (2) a comprehensive market linkage system which is itself composed of two elements - an intermarket order routing system and a universally available message switch linking orders to all markets; (3) the creation of a central file for public agency limit orders; (4) refinement of the consolidated transaction reporting system; (5) designation of the types of securities which will be "qualified" for trading in a national market system; and (6) disposition of the remaining off-board trading restrictions.

A great deal of progress has already been achieved, particularly in the area of dissemination of market information. The consolidated transaction reporting system is now fully operational, providing last sale information for listed securities of national investor interest on a current basis from all markets in which the securities are traded, and, on August 1, 1978, the Commission's quotation rule went into effect, calling for the dissemination of firm quotations, including size, from the various market centers.

There has also been progress in market linkage