

price must be paid to all stockholders, including those who tendered before the price was increased.

While these provisions could have a salutary effect, we prefer the provisions of H.R. 14475 which are described in my summary statement.

During the hearings before the Senate Committee, there was discussion of the practice known as "short tendering." Where a tender offer is made with a provision for acceptance of tendered shares on a pro-rata basis, some persons tender more shares than they own in order to gain an advantage over ordinary investors. Thus, if it is estimated that only half of the tendered shares will actually be purchased by the offeror, a short tenderor will tender twice as many shares as he owns and thus sell all of his shares, while ordinary investors sell only half. As a practical matter, short tendering is largely confined to member firms of the stock exchange, since it is usually provided that stock certificates must accompany a tender unless a member firm or a bank guarantees that they will be delivered upon acceptance. In its report, the Senate Committee suggested that the Commission could deal with this practice under the fraud provisions of the Securities Exchange Act, and the Commission has done so by adopting Rule 10b-4, which, in effect, prohibits short tendering.

ACQUISITIONS OTHER THAN TENDER OFFERS

Not all acquisitions of substantial blocks of securities are made by means of tender offers. A corporation or individual—or a group of corporations or individuals—can acquire a substantial block of stock of a company through a program of purchases in the open market, or through privately-negotiated purchases from substantial stockholders, and thus achieve the power to influence the management and control of the corporation, without the other stockholders even becoming aware of this development.

Section 16(a) of the Exchange Act, which requires ownership reports from any holder of ten per cent of the equity securities of a company, does not fully meet the need of stockholders for information in this kind of situation. It requires only information concerning number of shares and type of ownership and does not give the public stockholders adequate information about the arrangements surrounding the acquisition or the purchaser's intentions with respect to the company.

The bills would require any person or group of persons, which acquires more than ten per cent of any class of equity security of a publicly-held company, to file with the Commission, and to send to the issuer and to any exchange on which the security is listed, within seven days after the acquisition, a statement containing certain specified information. This information would be similar to that required of a person proposing to make a tender offer and would include the background and identity of the purchaser, the source of its funds, the number of shares acquired, any contracts or arrangements with respect to the securities of the company, and any plans of the purchaser to make major changes in the company's business or corporate structure.

It must be emphasized again, that in establishing requirements which will make this important information available to stockholders, we must be careful not to tip the scales to favor either incumbent managements or those who would seek to oust them. We believe that the provisions of the bills reflect on appropriate balance among competing interests which, at the same time, will fulfill the need of public stockholders to be fully informed about the control and potential control of the company in which they have invested.

There is another problem in this area which is dealt with by the bills. Under Section 14 of the Act, when directors of a registered company are to be elected at a meeting of stockholders, we require that the stockholders be furnished with full information about the nominees, whether or not proxies are solicited and whether or not the nominees have previously been elected by the stockholders. However, when a "controlling" block of stock in one of these companies is sold, and the contract of sale provides (as it often does) that the seller will procure the resignations of all or a majority of the existing directors and their replacement by designees of the buyer, the other stockholders not only do not get a chance to vote on the new directors, they normally do not even hear about the changes until they have actually taken place.

(This problem is dealt with in the bills which add a new Section 14(e) to the Act. Under this provision, if a majority of the directors of a company are to be replaced without a meeting of stockholders, pursuant to an arrangement with a person who is acquiring more than ten per cent of the stock of the company, then,