

rules is a model of administrative regulation by rulemaking which has served the purposes of the economy well.

There are differences between the proxy contest rules and the takeover bill. There is no doubt about that and I think the representatives of the Stock Exchange plan to deal with them. Nevertheless, we believe that this requirement is important. It would place a burden on the Commission, quite frankly, but we are, nevertheless, willing to assume it because we believe it will serve best the interests of the shareholder.

The second major respect in which the Senate bill differs is that that bill exempts offers made by means of a registration statement under the Securities Act of 1933. I adverted to this earlier.

Registration under that act will be required if the offeror seeks to acquire securities in exchange for new securities of his own rather than for cash. And in recent months and in the past year this particular mode of tender offer has become more and more popular. The House bill contains no such exemption.

The exemption in the Senate bill was presumably based on the conclusion that registration under the Securities Act will provide full disclosure to investors. That is true as to one side of the equation.

The pending legislation, however, applies not only to solicitations on behalf of the offeror but also to solicitations in opposition to the offer. Such solicitations are commonly made by the management if they elect to contest the tender offer. Under both bills the use of false or misleading statements by anyone in such solicitations is prohibited. But the exemption for registered offerings would mean that, although the offeror would be limited in his solicitations by the disclosure requirements of the Securities Act, solicitations in opposition would be unregulated except to the extent that the general antifraud provisions of the securities laws might apply. I think that this inequality is unjustified.

There are many situations as to which it would be difficult to mount a case of fraud but, as this committee decided back in 1934 with respect to proxy solicitations, this type of industrial warfare, if I may use that expression, should be subject to affirmative requirements which would be developed by the Commission to implement this legislation even if the activities do not rise to the level of fraud.

Our experience in the past 2 or 3 years indicates that this is very important.

(3) Under the House bill, securities deposited pursuant to a tender offer may be withdrawn at any time until they are accepted by the offeror, subject to such terms and conditions as the Commission may prescribe, and if the offer is for less than all the outstanding securities, they will be required to be taken up pro rata rather than on a first-come-first-served basis, again subject to rulemaking power in the Commission. Under the Senate bill, securities deposited under a tender offer may be withdrawn only during the first 7 days or after the expiration of 60 days, and pro rata acceptance is required only during the first 10 days of the offer. We think the House bill provides additional protections for stockholders in this respect and that, in view of the almost infinite variety in the terms of most tender offers, which are limited only by the ingenuity of the offeror and his counsel, some flexibility through rulemaking is needed.