

sponsibility of the Securities and Exchange Commission ("the Commission") are not limited to requiring appropriate disclosures and to guarding against deceptive and unfair devices in respect of the securities of publicly owned companies (i.e., those having equity securities registered pursuant to Section 12 of the Act). On the contrary, it extends to all issuers, public and private, and it appears to give the Commission power and responsibility to pass on the substantive merits of a particular issuer purchase program if in the Commission's judgment it is in the "public interest".

The proposal is broad enough to permit the adoption of rules that would be in conflict with, and would override, the substantive state law which has traditionally governed questions of corporate repurchases of stock and it certainly will permit the Commission to substitute its judgment for that of the issuer's management in the area. Under it, the Commission appears to be given power to regulate the price and other terms of an issuer repurchase, the amount of the repurchase, and the timing and method thereof. On its terms, it arguably is broad enough to permit the Commission if in its judgment it is necessary or appropriate "... in the public interest or for the protection of investors ..." to prohibit repurchases completely.

In addition, the proposals (except for H.R. 12210) introduce the "control" concept in defining issuer repurchases. This concept has a long history under the Securities Act of 1933 and the Commission and its staff have consistently avoided any concise definition of "control". Undoubtedly, this has been a sound approach from the standpoint of protecting potential investors by insuring full disclosure in doubtful cases even though a considerable burden of delay and expense has been imposed on the seller. Admittedly, there is also a disclosure problem in the case of acquisition by controlling persons but it is one of providing full disclosure rather than of restricting disclosure to prevent "overselling". This is an area in which the anti-fraud provisions of the Act already provide the Commission with adequate regulatory powers. And in any event the impact of the regulation should not be dependent on any vague concept of control but on the possession of "inside" information. If regulation of purchases is based on a control concept comparable to that applied under the Securities Act of 1933, it can only serve to restrict the market for outstanding securities to the detriment of the investor who desires to sell.

Finally, the proposals (except H.R. 12210) define issuer repurchases to include purchases by or for various employee benefit plans such as a pension plan, profit sharing plan, and the like. Admittedly, where the purchase programs under such plans are under the direction of the management of the issuer, there would seem no reason why they should not be treated as if they were purchases by the issuer and we understand this to be the case under existing law. However, where the programs are directed by independent entities such as trustees it seems doubtful that the considerations which might be applicable to repurchases by an issuer would have much relevance. More important in view of the substantive powers proposed to be given the Commission, this broad definition can create problems in other areas. For example, in the case of a pension or other plan which is the subject of negotiations with a labor union, the Commission could in effect be a third party at the negotiating table.

To justify the broad grant of new power which this proposal contemplates there should be substantial evidence that real regulatory problems exist. This seems to our Committee not to be the case. There is already a long history of application of the anti-fraud provisions to provide adequate disclosure of information pertinent to an investor's decision to resell his securities to the issuer or an insider. In the area of issuer repurchases intended for the purpose of manipulation of prices, the Commission, on its own statements, has certainly been successful on a case-by-case basis and it has the power under the anti-fraud provisions of the Act to adopt specific regulations to deal with this type of conduct. Finally, even in the case of programs which are admittedly for perfectly proper purposes but which might have an effect on "market performance and price levels", including programs under employee benefit plans operated under the direction of independent trustees, the Commission has had considerable regulatory impact on an informal basis. If the Commission finds that it is necessary or desirable, it has the power to adopt regulations to accomplish its purpose in this area.

Basically, the argument advanced for this proposal seems to be that it would be "helpful". This in our opinion in no way justifies the major extension proposed for the powers of the Commission, particularly when its existing powers by no means fully exercised.