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Postregistration Provisions of the Federal Securities Code

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The discussion of Part VI of the Federal Securities Code, dealing with postregistration provisions, falls naturally into three general areas: reporting requirements for registered companies, tender requests, and solicitation of proxies. This article will examine each category separately.

I. REPORTING REQUIREMENTS

A. Periodic Reports

The most comprehensive change proposed by the Code in the concept of disclosure is a shift from the current focus on the registration of individual securities issues or sales to a focus on registration of companies. Any company that meets certain minimum capitalization and shareholder tests is required to register with the Securities and Exchange Commission[1] and to file annual reports in a form

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1. ALI FED. SEC. CODE § 401(a) (Tent. Draft No. 1, 1972) [hereinafter cited as TD-1]; ALI FED. SEC. CODE § 401(a) (Reporter's Revision of Text of Tent. Drafts Nos. 1-3, 1974) [hereinafter cited as RD 1-3]. The section provides that a company having $1,000,000 in assets and 300 security holders must register with the Commission. The Code also provides for voluntary registration of companies not meeting these minimum tests. TD-1 § 401(b); RD 1-3 § 401(b).

to be prescribed by the Commission.[2] Rather than register each issue of securities, a company will prepare and circulate an "offering statement" similar to the prospectus currently required for individual issues or sales.[3] Although the change undoubtedly will be beneficial, many of its ramifications depend upon rules to be promulgated by the Commission pursuant to its broad delegated authority.[4] Consequently, discussion of the Code is limited at this time to general comments on its scope and direction. The Code contemplates integration of the major features of the company's registration statement into the annual report, which will replace the prospectus and proxy statement as the "central device for continual disclosure" by public companies.[5] As the "central device for continual disclosure," the annual report presumably will be reviewed and commented upon by the SEC staff prior to dissemination. In addition, the Code imposes more specific civil liability upon registrant companies, directors, and officers for inaccuracy and incompleteness of material contained in the reports.[6]

Because of the importance of maintaining readability while meeting the above requirements, the Code contemplates that many companies will adopt the practice of preparing a two-part annual report.[7] The first part would be equivalent to the present Form 10-K, but unlike present practice, the SEC presumably would review it before distribution to shareholders.[8] The second part, containing so-called "optional material," would be similar to present annual reports in that it would afford the company an opportunity to describe its performance in layman's terms. The Code allows the SEC to *require* prior review of this material.[9]

At least two problems are posed by this approach to disclosure. First, the Code apparently contemplates Commission review of the

2. TD-1 § 601(a); RD 1-3 § 601(a).

3. TD-1 § 501; RD 1-3 § 501.

4. For example, the Code authorizes the Commission to require reports in addition to annual and quarterly reports. TD-1 § 601(a). The controversy arises, however, whether these additional reports are not most in need of specific regulation.

5. TD-1 § 601(a)(2), Comment 2(a).

6. The Commission's control over the annual report presently is limited to proxy rules governing the financial statements and summaries of operations that must be provided security holders before the annual meeting. Rule 14a-3, 17 C.F.R. § 240.14a-3 (1976); 17 C.F.R. § 240.14a-101 Item 15(d). Some additional control is provided, however, by the general liability imposed under § 10(b), 15 U.S.C. § 78j (1970), and rule 10b-5, 17 C.F.R. § 240.10b-5 (1976), for misleading disclosures.

7. TD-1 § 601(b), Comment 2(c).

8. At present, the SEC staff reviews 10-K's after filing and occasionally requests additional information for its files that amends or supplements the original filing.

9. TD-1 § 601(c); RD 1-3 § 601(c).

portion of the annual report that must be prefiled.[10] Because of the present size of the SEC staff and the number of companies subject to the filing requirements, the Commission may be unable to review the annual reports effectively without substantially delaying their dissemination.[11] Secondly, one part of the report paraphrases material that has been prepared carefully under SEC staff scrutiny, but this part of the report is not reviewed by the staff. In light of the additional civil liability contemplated by the Code, this procedure presents a lawyer's nightmare.

An additional problem will arise under section 601(a) if the Commission requires companies to include substantial prospectus-like information in the annual report. Shareholder response to the recent expansion of the information required in present Form 10-K,[12] as well as to the availability without charge of the 10-K on request,[13] indicates a lack of a continuing stockholder interest in such material.[14] Thus, although registration of companies will have the salutary effect of eliminating repetitive and burdensome disclosure in connection with each new issue of securities, the burden may be shifted merely to a different filing.

The Code also gives the SEC authority to require issuance of press releases "to keep investors reasonably informed with respect to the registrant."[15] This expands the direct power of the Commission over immediate disclosure, which currently is limited to rule 10b-17, Form 8-K, and the various informal means by which the SEC can prompt the issuance of press releases.[16] The stated objec-

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10. TD-1 § 601, Comment 2(c).

11. In an effort to expedite review of registration statements, the Commission has instituted procedures that require only cursory review in some instances. In other instances, however, the staff requires a lengthy review and comment process. *See, e.g.,* Securities Act Release No. 5231 (Feb. 3, 1972); Securities Act Release No. 4934 (Nov. 21, 1968). Additionally, the author has been advised informally by the Commission staff that similar procedures have been adopted this year for proxy statements.

12. *See* Securities Exchange Act Release No. 13,156 (Jan. 13, 1977).

13. *See* Securities Exchange Act Release No. 10,591 (Jan. 10, 1974); Exchange Act Rule 14-93.

14. A 1976 survey showed that an average of only 0.16% of stockholders responded to company offers to mail copies of the Form 10-K filing. FINANCIAL RELATIONS UNIT, HILL & KNOWLTON, INC., STOCKHOLDER RESPONSE TO ANNUAL REPORT INVITATION TO WRITE FOR THE FORM 10-K (1974).

15. TD-1 § 601(a); RD 1-3 § 601(a).

16. These informal methods include the suspension of trading in securities under Securities Exchange Act §§ 15(c)(5), 15 U.S.C. § 78o(c)(5) (1970) and 19(a)(4), 15 U.S.C. § 78s(a)(4)(1970) and the refusal to accelerate the effectiveness of registration statements. Further, the national and regional stock exchanges and the National Association of Securities Dealers, Inc. already have rules governing immediate disclosure. *See, e.g.,* NYSE Company Manual, Section A-6; ASE Company Guide §§ 401-406.

tive of section 601(a) of the Code is "to make this delicate area of disclosure more definite than it now is."[17] The Commission is delegated the responsibility of promulgating rules that will provide definite disclosure requirements, and, presumably, some "safe harbors." Recent reluctance by the SEC to issue definitive guidelines in the complex questionable payments area,[18] however, suggests that the drafters of the Code may contemplate this delegation more easily than the Commission would be willing to implement such guidelines.

The Code authorizes the Commission to require registrants to retain copies of their periodic reports and press releases if, in the words of the drafters, the SEC "prefers not to clutter up its own files."[19] Although preservation by the SEC of all press releases presents the prospect of a deluge of peripherally relevant material that would overwhelm the public reference room, the benefit of centralized public access would be substantial. The SEC's public reference room currently is anything but a means of ready access to filed materials. Filed documents often take weeks to reach the reference room (which is located in a different building and neighborhood from the filing desk), and significant documents often are removed from the reference room by SEC staff members in the conduct of their work. Thus the practical benefit of centralized filing most likely could be obtained only by reorganization of the SEC's public filing sytem.

B. *Insider Reports*

Section 604(a) of the Code retains the disclosure requirements presently contained in section 16(a) of the Securities Exchange Act concerning officers, directors, and holders of more than ten percent of a class of registered equity securities.[20] These insiders will be required to file reports with the SEC after they attain insider status and after any subsequent change in ownership of their company's securities.[21] The time period for filing is to be determined by the Commission, although the first draft of the Code required filing

17. TD-1 § 601, Comment 4(d).

18. *See, e.g.,* Securities Exchange Act Release No. 13,185 (Jan. 19, 1977).

19. TD-1 § 601(a)(3), Comment 3.

20. TD-1 § 604(a); RD 1-3 § 604(a).

21. TD-1 § 604(a). These reports currently must be filed within 10 days after filing status is attained and within 10 days after the end of the month in which a change occurs. Securities Exchange Act of 1934 § 16(a) [hereinafter cited as 1934 Act], 15 U.S.C.A. § 78p (Supp. 1976).

within ten days.[22] In a recent change from prior practices, the SEC now requires that Form 8-K be filed in most instances within fifteen days after the triggering event.[23]

The Code makes two addititional changes from present law. First, insiders must file reports concerning holdings of all classes of a registered company's equity securities, rather than of all classes of registered securities, as is currently required.[24] This requirement logically extends the Code's conceptual shift from registration of securities to registration of companies. Secondly, insiders must deliver the reports they file with the SEC to their companies, thus encouraging companies to enforce the prohibitions against short-swing profits without the expense of shareholders' derivative suits or intervention by the SEC.[25] If companies conscientiously review the filings of their insiders, the concomitant antifraud section of the Code could become self-enforcing and more efficient than section 16(b) of the Exchange Act, which is often ignored by many companies. As a practical matter, companies today increasingly are requiring that insiders obtain company approval before executing transactions in their company's securities. This practice not only decreases the likelihood of an inadvertent short-swing trading violation, but also increases the company's ability to guard against trading by insiders at a time when the company possesses material information that it has failed to disclose for legitimate purposes.[26]

The Code, however, seems to preserve the present overlap between section 16(a) of the Exchange Act, which is incorporated in section 604(a) of the Code, and section 13(d) of the Exchange Act, which is carried over into section 604(b) of the Code. These two sections are designed to accomplish different objectives: section 604(a) serves as a mechanism for monitoring short-swing trading by insiders and disclosing trends in trading that might indicate abuse of inside information; and section 604(b) requires anyone who acquires five percent of a company to disclose his or her intentions concerning that company, including any plans to acquire control. Notwithstanding their different purposes, possibly these sections could be combined, especially to harmonize the percentage of holdings necessary to bring the sections into play.

22. TD-1 § 604(a); ALI FED. SEC. CODE § 604(a) (Tent. Draft No. 2, 1972) [hereinafter cited as TD-2]; RD 1-3 § 604(a).

23. *See* Securities Exchange Act Release No. 13,156 (Jan. 13, 1977).

24. *See* 1934 Act § 16(a), 15 U.S.C.A. § 78p (Supp. 1976).

25. TD-1 § 604(a); TD-2 § 604(a); RD 1-3 § 604(a).

26. *See* Flom & Atkins, *The Expanding Scope of SEC Disclosure Laws,* 52 HARV. BUS. REV. 109 (1974).

II. TENDER REQUESTS

A. A Definitional Approach

One change the Code would incorporate concerning tender offers is its replacement of the statutorily undefined[27] "tender offer" with a statutorily defined "tender request."[28] This change will provide a more exact legal description of the contractual process. In a typical tender offer it is not the offeror that tenders, as the phrase "tender offer" suggests, but rather the offeree.[29] The offeror requests offerees to tender shares of the target company pursuant to the terms of the offer.[30]

In terms of contract law, tender offers are always conditional offers that contemplate the formation of unilateral contracts.[31] Acceptance takes place when shares are tendered, binding the tender offeror to purchase the shares according to the conditions in his offer.[32] The contract remains partially executory until the offeror completes performance by "taking down" the shares. Thus, as a matter of contract law, once shares are tendered pursuant to an offer, the acceptance is irrevocable and the tendered shares cannot be withdrawn.[33] Section 14(d)(5) of the Exchange Act, however, provides that a tendering shareholder may withdraw his shares "at any time until the expiration of seven days after the time definitive

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27. The generally understood meaning of the term "tender offer" is described in the House Report as

> a bid by an individual or group to buy shares of a company—usually at a price above the current market price . . . [w]hich obligates himself to purchase all or a specified portion of the tendered shares if certain specified conditions are met.

See Securities Exchange Act Release No. 8392 (Aug. 30, 1968). Similarly, Aranow & Einhorn have indicated that a tender offer may generally be defined as follows:

> A public offer or solicitation by a company, an individual or a group of persons to purchase during a fixed period of time all or a portion of a class or classes of securities of a publicly held corporation at a specified price or upon specified terms for cash and/or securities.

E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 70 (1973) [hereinafter cited as ARANOW & EINHORN]. *See also* Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,590 (N.D. Ill. 1973).

28. TD-1 § 299.9; RD 1-3 § 299.9.

29. Comment 2 to TD-1 § 299.9 states:

> "Tender request" is used rather tban "tender offer," because the latter phrase is imprecise and confusing. It is not the offeror who is tendering. The offeror is inviting the *offerees* to tender their securities. The phrase "tender offer" has become colloquial, but it is nevertheless an inexact legal description of what is going on.

30. ARANOW & EINHORN, *supra* note 27, at 69 n.18.

31. Lowenschuss v. Kane, 520 F.2d 255 (2d Cir. 1975).

32. *Id.*; R. E. Crummer & Co. v. Nuveen, 147 F.2d 3, 5-6 (7th Cir. 1945); Levenburg v. Merrill Lynch, Pierce, Fenner & Beane, 334 Mich. 508, 54 N.W.2d 626 (1952).

33. Levenburg v. Merrill Lynch, Pierce, Fenner & Beane, 334 Mich. 508, 54 N.W.2d 626 (1952).

copies of the offer or request or invitation are first publicized."[34] The offeror's obligation to accept tendered shares, however, is not subject to any right of revocation. Accordingly, standard tenders, generally denominated "offers to purchase," usually make the offeror's obligation to purchase tendered shares subject to a variety of conditions. Absent such conditions, the offeror conceivably may be liable for breach of the tender offer contract in spite of events rendering completion of the offer undesirable or even legally impossible.[35]

In addition to providing the tender offer with a new name, the Code substantively defines a "tender request" as

> an offer to buy a security, or a solicitation of an offer to sell a security, that is directed to more than thirty-five persons, unless it (1) is incidental to the execution of a buy order by a broker or dealer in a trading transaction (or a transaction that would be a trading transaction except for section 227(c)(1)(A)), and (2) satisfies any additional conditions that the Commission imposes by rule.[36]

Adoption of this section would constitute a Congressional rejection of the position recently taken by the SEC that the term "tender offer" should not be defined.[37]

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34. The appropriate length of the withdrawal period remains the subject of substantial interest. *See* notes 94-96 *infra* and accompanying text. Tendered shares also may be withdrawn if more than 60 days have passed since the offer was first made and the shares have not been purchased by the offeror. 1934 Act § 14(d)(5), 15 U.S.C.A. § 78n(d)(5) (Supp. 1976).

35. In Lowenschuss v. Kane, 520 F.2d 255 (2d Cir. 1975), an offer by Gulf & Western Industries, Inc. (G&W) to purchase 3,750,000 shares of the Atlantic & Pacific Tea Co., Inc. (A&P) at $20 per share contained neither the standard "litigation out" clause nor the usual provisions relieving the offeror of his obligation to purchase the tendered shares upon the occurrence of certain adverse events. Upon learning of the offer, Lowenschuss, acting as trustee for a pension fund, decided to purchase 2,000 shares of A&P stock at $18-5/8 and to tender the shares to G&W. That same morning A&P's management decided to oppose G&W's tender offer and issued a press release stating its intentions. Lowenschuss learned of A&P's opposition and attempted to cancel his purchase order. He rescinded this cancellation, however, after determining that litigation would not constitute a basis for refusal of his tender or for rescission of the offer, and tendered the shares to G&W on the last day permitted by the offer.

In the meantime, A&P instituted litigation seeking *inter alia* a preliminary injunction against G&W's proposed acquisition. The injunction was granted by the district court and affirmed on appeal. As a result, the tender offer was withdrawn.

Lowenschuss then sued G&W seeking payment according to the terms of the tender offer and damages. The district court granted summary judgment dismissing the complaint. The Court of Appeals for the Second Circuit reversed the district court's dismissal, holding that G&W's legal defenses of impossibility and illegality presented genuine issues of material fact.

36. TD-1 § 299.9; RD 1-3 § 299.9.

37. In recent hearings, the Commission considered, *inter alia*, whether to define the term "tender offer" and whether to include or exclude from any such definition (1) open market purchases, (2) offers or invitations to a limited number of persons and (3) privately negotiated transactions. Notice of Public Fact Finding Investigation in the matter of Beneficial Ownership, Take-Overs and Acquisitions by Foreign and Domestic Persons, Securities

The refusal of Congress and the Commission to define the term "tender offer" reflects a determination to preserve the flexibility of the Commission and the courts in making decisions on a case-by-case basis.[38] Although some courts have interpreted tender offer in an orthodox manner,[39] the Commission and most courts have adopted the "shareholder impact" test, which extends the definition of the term[40] well beyond its generally accepted meaning.[41] This test, first suggested in an influential law review article,[42] broadens the term "tender offer" to encompass offers having the same impact as conventional tender offers, such as offers "likely to pressure shareholders into making uninformed, ill-considered decisions to sell."[43]

Under the Code,[44] an offer directed to thirty-five or fewer persons could not constitute a tender request even if overreaching or pressure tactics could be demonstrated. Conversely, an offer directed to more than thirty-five persons would constitute a tender offer despite the absence of tender offer impact on the offerees.[45]

Exchange Act Release No. 11,003 (Sept. 9, 1974). *See also* Securities Exchange Act Release No. 12,676 (Aug. 2, 1976).

38. ARANOW & EINHORN, *supra* note 27, at 69-70. *See also Survey of 1974 Securities Law Developments*, 32 WASH. & LEE L. REV. 719, 772-76 (1975).

39. *See, e.g.*, D-Z Inv. Co. v. Holloway, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,711 (S.D.N.Y. 1974); Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., 356 F. Supp. 1066, 1074 (S.D.N.Y.), *aff'd*, 476 F.2d 687 (2d Cir. 1973).

40. *See* Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974); Lowes Corp. v. Accident & Cas. Ins. Co., No. 74-C-1396 (N.D. Ill. July 11, 1974); Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248 (W.D. Okla. 1972). *See also* LSL Corp., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,715; Yellow Freight Sys. Inc., [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,192.

41. Black, *Triggering the Williams Act*, 8 REV. SEC. REG. 967, 970 (1975). *See also* ARANOW & EINHORN, *supra* note 27, at 70.

42. Note, *The Developing Meaning of "Tender Offer" under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973).

43. *Id.* at 1281; Nachman v. Halfred Corp., Inc., [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,445, at 95,590 (N.D. Ill. 1973).

44. TD-1 § 299.9(1); RD 1-3 § 299.9(1).

45. The Code's definition of tender request also excludes offers "incidental to the execution of a buy order by a broker or dealer in a trading transaction" if the offers also satisfy any additional conditions that the Commission imposes by rule. TD-1 § 299.9(a)(1); RD 1-3 § 299.9(a)(1). The term "trading transaction" is defined by the Code in RD 1-3 § 227(c)(1) as follows:

> [Trading transaction.] (1) a 'trading transaction' is a transaction through a broker or with or by a dealer if the following conditions are satisfied: (A) the transaction is not by or for the account or benefit of the issuer; (B) the security was not the subject of a limited offering within the one-year or three-year period (as the case may be) specified in section 227(b); (C) the broker or dealer performs no more than the usual function of a broker or dealer in a trading transaction; (D) he receives no unusual compensation; and (E) the total of all trading transactions originating with or for the account of the same person

Moreover, the introduction of an arbitrary cutoff raises the question whether several offers to purchase securities, each directed to fewer than thirty-five offerees on similar but not identical terms, constitute "an offer . . . directed to more than thirty-five persons" or merely several discrete offers, each directed to a number of offerees insufficient to constitute a tender request.[46] Whether offers made to several persons will be viewed as one tender request likely will turn upon the factual indicia provided by section 299.9(b) of the Code to distinguish between single and multiple tender requests.[47] Section 299.9(b) provides:

> A tender request is separate from any other tender request if (1) it is for a different class of securities or (2) it is for additional securities of the same class but is substantially distinct on the basis of such factors as the manner, time, or purpose of the tender requests, the specified price, or the kind of consideration.

Under this section, before one tender request for the same class of securities would be considered separate from another, it would have to be *substantially* distinct in manner, time, purpose, and consideration. The section provides additional protection to shareholders and simultaneously limits the flexibility of companies acquiring an

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during a specified period does not exceed whatever amount in dollars, percentage of trading volume, or percentage of the outstanding securities of the class the Commission specifies by rule.

This section codifies present case law holding that open market purchases do not constitute tender offers, and authorizes the Commission to impose additional requirements. *See, e.g.*, D-Z Inv. Co. v. Holloway, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771 (S.D.N.Y. 1974); Hunt v. Great Western United, slip op. (D. Tex. 1974); Gulf & Western Indus., Inc. v. Great Atlantic & Pacific Tea Co., 356 F. Supp. 1066 (S.D.N.Y.), *aff'd*, 476 F.2d 687 (2d Cir. 1973); General Host Corp. v. Triumph American, Inc., 359 F. Supp. 749 (S.D.N.Y. 1973); Water & Wall Assocs., Inc., v. American Consumer Indus., Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,943 (S.D.N.Y. 1973); Texasgulf, Inc. v. Canada Development Corp., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,160 (S.D. Tex. 1973). *But see* Griffin & Tucker, *The Williams Act, Public Law 90-439—Growing Pains? Some Interpretations with Respect to the Williams Act*, 16 How. L.J. 654 (1974). The arguments in favor of excluding open market purchases are persuasive when the purchases do not exert pressure on shareholders. When, however, the purchases are made pursuant to a publicly announced open-market buying program limited in number and subject to a specific time period, the purchases clearly have an impact similar to that of a traditional tender offer and should be subject to the Williams Act. *See* Letter from American Bar Association, Section of Corporate, Banking and Business Law, to Securities and Exchange Commission (Dec. 9, 1974) (relating to File No. 4-175, Notice of Public Fact-Finding Investigation in the matter of Beneficial Ownership, Take-Overs and Acquisitions by Foreign and Domestic Persons) [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,956 (Sept. 9, 1974).

46. The definition of "offer" contained in the Code does not answer this question. *See* TD-1 § 293(b); RD 1-3 § 293(b) ("Offer . . . includes every attempt . . . or solicitation of an offer to buy a security or interest in a security for value.").

47. *See* TD-1 § 299.9(b); RD 1-3 § 299.9(b).

initial position through tender requests. For example, if a tender request by Company *X* for fifty-one percent of the stock of Company *Y* at a price two dollars above the prevailing market price attracts only twenty-five percent of the stock of Company *Y*, an attempt soon thereafter by Company *X* to acquire the remaining twenty-six percent of Company *Y* stock through a second tender request at four dollars per share over the original prevailing market price might be combined with the initial offer as a single tender request under section 299.9(b). In this situation, section 605(f)[48] would require Company *X* to pay the shareholders who tendered their shares pursuant to the first tender request an additional two dollars per share.[49]

Although the definitional approach adopted by the Code may clarify an area in which relevant case law has developed unevenly, the approach creates at least as many problems as it solves. As was noted above, the SEC has refused to define the term "tender offer." The Commission's position is based upon the necessity for retaining flexibility to deal with novel transactions.[50] A statutory definition of the term "tender offer" would limit the Commission's ability and

48. TD-3 § 605(f) and RD 1-3 § 605(f) provide:

> When the terms of a tender request within section 605(a) or hy the registrant are varied hefore its expiration by increasing the consideration offered, the person making the tender request shall pay the increased consideration to each holder whose securities are taken up before the variation.

This section adopts the provisions of § 14(d)(7) of the 1934 Act. 15 U.S.C. § 78n(d)(7) (1970). A common practice under present law is to evade the requirements of § 14(d)(7) by allowing an offer to expire without increasing the consideration offered and then making a second offer for securities of the same class at an increased consideration. Commentators have suggested that the practice should be avoided as "an attempt to exploit investors . . . [that] may well tarnish the offeror's reputation in the investment community as well as compromise its ability to successfully consummate future takeover attempts." ARANOW & EINHORN, *supra* note 27, at 135-36.

49. Recently proposed Commission rules would integrate certain purchases made by a tender offeror within 40 days *after* the termination of the offer into the tender offer for purposes of § 14(a). Purchases made pursuant to a subsequent tender offer specifically are excluded from the operation of the proposed rule, if the consideration in the subsequent offer is no lower than the consideration offered at any time during the initial offer. SEC Securities Exchange Act Release No. 12,676 (Aug. 2, 1976), [Current] FED. SEC. L. REP. (CCH) ¶ 80,659, at 86,715.

50. The Commission has stated that:

> In light of the record of the Tender Offer Hearings, the Commission's position at this time is that a definition of the term "tender offer" is neither appropriate nor necessary. This position is premised on the dynamic nature of these transactions and the need of the Commission to remain flexible in determining what types of transactions, either present or yet to be devised, are or should be encompassed by the term. Therefore, the Commission specifically declines to propose a definition of the term "tender offer."

SEC Securities Exchange Act Release No. 12,676 (Aug. 2, 1976), [Current] FED. SEC. L. REP. (CCH) ¶ 80,659, at 86,695-96.

authority to deal with novel transactions more drastically than would a definition promulgated by the Commission at the agency level. For example, assume that Company *Y* has made a tender offer for Company *X* and that on the last day of the offer Company *Z*, whose own friendly overtures to Company *X* had been rebuffed, purchased directly from several large arbitrageurs a sufficient number of shares to gain control of Company *X*, at a price slightly in excess of the tender price. Under the Code's approach, the Commission virtually would be precluded from dealing with this particular situation through enforcement proceedings, but it also might be precluded from dealing generally with this type of transaction through rulemaking.[51]

An alternative approach suggested unofficially by the American Bar Association, Section of Corporate, Banking, and Business Law, appears more feasible than the definitional approach adopted by the Code.[52] Under the ABA approach, the Commission would promulgate guidelines that would serve as "safe harbors." Any transaction meeting the guidelines would not be treated as a tender request, but the Commission would still have an opportunity to apply the shareholder impact test to transactions not meeting the guidelines.

B. *Treatment of the "Group"*

The Code also changes the concept of a "group" within sections 13(d)(1) and 14(d)(1)[53] of the Exchange Act. The determination of when a Section 13D Statement must be filed by a "group" owning in the aggregate more than five percent of a class of equity securities specified in section 13(d)(1) presents a difficult issue of statutory interpretation of the Williams Act. Specifically, the issue is whether the filing is triggered when the group is formed, when the group

51. Variations of this tactic have occurred at least three times in recent years, and in each instance, the SEC took no action.

52. *See* Letter from American Bar Ass'n, Section of Corporate, Banking and Business Law, to the Securities and Exchange Comm'n (Dec. 9, 1974) (relating to File No. 4-175, Notice of Public Fact-Finding Investigation in the matter of Beneficial Ownership, Takeovers and Acquisition by Foreign and Domestic Persons, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,956 (Sept. 9, 1974)).

53. 15 U.S.C. §§ 78m(d)(1), 78n(d)(1) (1970). The filing requirements of §§ 13(d)(1) and 14(d)(1) have been adopted without substantial change by Code §§ 604(b) and 606(a). RD 1-3 §§ 604(b) & 606(a). Section 606(a) does, however, substitute a broad delegation to the Commission for the list of specific requirements previously contained in § 13(d)(1)(A)-(E). Because § 13(d)(1) authorizes the Commission to require disclosure of information not listed in subsections (A)-(E), the Code considers this recitation of specifics unnecessary. *See* TD-1 § 606(a), Comment (2).

agrees to acquire some additional shares, or only when a group owning more than five percent acquires additional stock in excess of the two percent exemption contained in section 13(d)(6)(B).[54] The courts are sharply divided on this issue.

The question was first raised in *Bath Industries, Inc. v. Blot*,[55] in which Bath Industries sought to enjoin defendants, none of whom individually owned ten percent of the stock of Bath, from acting in concert until they filed a Schedule 13D Statement. The Court of Appeals for the Seventh Circuit rejected Bath's contention that sections 13(d)(1) and 13(d)(3) required defendants to comply with the Act's disclosure provisions within ten days after the owners of a sufficient number of shares agreed to act in concert toward any goal, even if any member of the putative group did not purchase additional Bath stock. The court stated that

> the Act should be interpreted to require compliance with its disclosure provisions, when, but only when, any group of stockholders owning more than 10% of the outstanding shares of the corporation agree to act in concert *to acquire additional shares.*[56]

The court in *Bath* based its decision upon the intention of the drafters of the Williams Act to protect investors and not to tip the balance toward incumbent management. Moreover, the court was persuaded by the argument that requiring a filing at any earlier point would have a chilling effect upon concerted action by shareholders:

> This construction focuses on the decision on the part of a group owning more than 10% of a corporation to acquire more shares. Thus it honors the repeated expressions of legislative intent to draft a statute to protect investors rather than to protect current management. It does not proscribe informal discussion among existing shareholders concerning the performance of current management. Nor does it proscribe legitimate cooperation among existing shareholders to assert their determination to take over control of management, *absent* an intention to acquire additional shares for the furtherance of such purpose.
>
> However, when such a group of existing shareholders reaches the point where it decides to buy additional stock to reinforce its position against management, full disclosure for the benefit and protection of other stockholders and investors will be required. The clear purpose of the legislation is to protect these stockholders and investors, and it is at this point that the need for the Act's protection becomes critical. Thus it follows that once the group *agrees* to act in concert *to acquire shares,* its members must comply with the Act's disclosure requirements whether or not any one of them has at that time acquired stock in furtherance of the underlying plan.[57]

54. Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (amending 15 U.S.C. §§ 78m & 78n (1970)).

55. 427 F.2d 97 (7th Cir. 1970).

56. *Id.* at 109 (emphasis by court).

57. *Id.* at 109-10 (emphasis by court).

The question arose again in *GAF Corp. v. Milstein.*[58] In *GAF*, the defendants, all members of the same family, acquired slightly more than ten percent of GAF's preferred stock following a 1967 merger between GAF and Ruberoid. Plaintiff GAF Corporation alleged that defendants formed a group for the purpose of acquiring control of GAF and had failed to file the information required by section 13(d) within the ten days allowed. Since none of the members of the alleged group had purchased any additional GAF preferred stock after the group was formed, the question presented to Judge Pollack on defendants' motion to dismiss was "whether, organizing a group of stockholders owning more than 10% of a class of equity securities with a view to seeking control is, without more, a reportable event under Section 13(d) of the Exchange Act. . . ."[59]

Judge Pollack, in dismissing the complaint, went beyond the decision in *Bath* and held not only that additional purchases are required to activate the filing requirements of section 13(d), but that the purchases also must exceed the two percent exception contained in section 13(d)(6)(B).[60]

When the question reached the Court of Appeals for the Second Circuit soon thereafter, the court reversed, stating:

> In light of the statutory purpose as we view it, we find ourselves in disagreement with the interpretation of *Bath Industries, supra,* that the group owning more than 10%, despite its agreement to seize control, in addition, must agree to acquire more shares before the filing requirement of section 13(d) is triggered. The history and language of section 13(d) make it clear that the statute was primarily concerned with disclosure of *potential changes* in control resulting from new aggregations of stockholdings and was not intended to be restricted to only individual stockholders who made future purchases and whose actions were, therefore, more apparent . . . . It hardly can be questioned that a group holding sufficient shares can effect a takeover without purchasing a single additional share of stock.[61]

58. 324 F. Supp. 1062 (S.D.N.Y.), *rev'd in relevant part,* 453 F.2d 709 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972).

59. 324 F. Supp. at 1064.

60. Section 13(d)(6)(B), 15 U.S.C. § 78m(d)(6)(B) (1970), provides that

> [t]he provisions of this suhsection shall not apply to any acquisition of the beneficial ownership of the security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed two per centum of that class.

The Code preserves this exemption in § 604(b)(1)(A). TD-1 § 604(b)(1)(A); RD 1-3 § 604(b)(1)(A). In addition, § 604(b)(2) clarifies the relationship between § 13(d)(2) and rule 13d-2, which require amendment in the event of any material change, and the two percent exemption contained in § 13(d)(6)(B). The Code would not require amendments for purchases made subsequent to an initial filing until they totaled 2%. *See* 6 L. Loss, SECURITIES REGULATION 3666 (Supp. 1969) [hereinafter cited as Loss].

61. 453 F.2d at 718 (emphasis by court); *accord,* Water & Wall Assocs., Inc. v. American Consumer Indus., Inc., [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,943 (D.N.J.

Section 604(b) of the Code was silent on this issue in the original Tentative Draft No. 1 because a petition for certiorari was pending in *GAF*.[62] The Reporter at that time reserved the option to take a position on this question but did so in Tentative Drafts Revised Nos. 1-3 by adding the following language to section 604(b):

> Notwithstanding Section 276(b), the formation of a group of two or more persons who act in concert for the purpose of acquiring, holding, or voting equity securities is not an acquisition of those securities from the members of the group.[63]

According to the comments, the Code purports to settle the controversy by adopting the view expressed by Judge Pollack in the District Court *GAF* opinion. The Code, however, does not go as far as the comments. Although it clearly rejects the views of both the Second and Seventh Circuits expressed in *GAF* and *Bath*, one is unsure whether the Code affirmatively adopts Judge Pollack's holding that post-formation purchases must exceed the two percent exception before filing is required or whether *any* additional purchases will suffice.

Although the comments indicate that consultants and advisors favor the Code position, the Second Circuit view is consistent with the intent of the drafters of the Williams Act[64] (as the Reporter at one time agreed)[65] and with the most recent position of the Commis-

1973). *See also* 6 Loss, *supra* note 60, at 3664; Comment, 119 U. Pa. L. Rev. 853, 864-72 (1971).

62. *See* TD-1 § 604(b), Comment (6). The Code's definition of "group" is contained in § 276(b) and provides as follows:

> When two or more persons act in concert for the purpose of acquiring, holding, voting, or disposing of securities, the group is considered a "person" for the particular purpose to the extent that the Commission so prescribes by rule or a court or the Commission so determines under the circumstances of a particular case.

RD 1-3 § 276(b). This provision incorporates the "group" concept presently found in §§ 13(d)(3) and 14(d)(2) of the Exchange Act and delegates to the Commission authority to further define the term.

63. RD 1-3 § 604(b).

64. Both the House and Senate Reports accompanying the Williams Act contain the following statement of legislative intent:

> [Section 13(d)(3)] would prevent a group of persons who seek to pool their voting or other interests in the securities of an issuer from evading the provisions of the statute because no one individual owns more than 10 percent of the securities. *The group would be deemed to have become the beneficial owner, directly or indirectly, of more than 10 percent of a class of securities at the time they agreed to act in concert. Consequently, the group would be required to file the information called for in section 13(d)(1) within 10 days after they agree to act together, whether or not any member of the group had acquired any securities at that time.*

S. Rep. No. 550, 90th Cong., 1st Sess. 8 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 8-9 (1968), *reprinted in* [1968] U.S. Cong. & Ad. News 2818 (emphasis supplied).

65. *See* 6 Loss, *supra* note 60, at 3644.

sion.[66] More importantly, the Second Circuit view is consistent with the strong public policy requiring disclosure of all rapid accumulations of voting power. Formation of a group that in the aggregate owns more than five percent certainly is no less significant than acquisition of more than five percent by an individual or corporation. For example, formation of a "group" of eleven shareholders, each of whom owns five percent would not trigger the filing requirements of the Code, but would be far more significant than the acquisition of 5.1 percent by an individual. The individual, however, must file under the Code. A group that holds sufficient shares clearly can effect a takeover without ever purchasing or intending to purchase a single additional share of stock.

C. *Preemption of State Takeover Statutes*

As a practical matter, the single most important change made by the Code in the area of tender requests is its attempt to reconcile the Williams Act and state takeover statutes. The recent proliferation of state takeover statutes has had a chilling effect on tender offers, as prospective offerors and many corporations will attest. Tender offerors have been forced to seek targets having no substantial contacts with states that have takeover statutes in effect, and many corporations have sought sanctuary from unfriendly offers in these states.[67] The constitutionality of these statutes has been questioned by some commentators,[68] and complaints have been filed attacking their constitutionality,[69] but the issue has not been resolved because of financial, procedural,[70] or other reasons. The SEC

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66. Proposed rule 13d-6(b) codifies the Second Circuit view by deeming persons who have agreed orally or in writing to act together for the purpose of acquiring, holding, or disposing of securities to have "acquired" *as of the time of the agreement* the securities owned by each of the persons in the group. Thus, a Schedule 13D must be filed even if no intention to purchase additional shares exists or no additional purchases occur. SEC Securities Exchange Act Release No. 11,616 (Aug. 25, 1975), [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 85,285, at 85,633. Proposed rule 13d-6(b) would provide:

> Persons who agree, orally or in writing, to act together for the purpose of acquiring, holding or disposing of securities of an issuer shall be deemed to have acquired, as of the date of such agreement, beneficial ownership of all the securities of that issuer beneficially owned by such persons, for purposes of Section 13(d)(1).

Id. at 85,648.

67. N.Y. Times, Oct. 3, 1976, § 3, at 18, col. 3.

68. *See* ARANOW & EINHORN, *supra* note 27, at 156-58, 172; Sommer, *The Ohio Takeover Act: What Is It?* 21 CAS. W. RES. L. REV. 681 (1970); Wilner & Landu, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1 (1976).

69. *See* Thrall Car Mfg. Co. v. Rhodes, Civ. Action No. 2-76-605 (S.D. Ohio 1976); Bethlehem Copper Co. v. Rhodes, Civ. Action No. 2-76-89 (S.D. Ohio 1976). *See also* Ohio v. Imetal, 75 CV 09-3868.

70. Most putative litigants would prefer to launch their attacks in a federal forum, but

has recommended that Congress expressly preempt state regulation of tender offers,[71] and the Code, consistent with the Commission position, would provide that its own regulation of tender requests is "exclusive and plenary," thus effectuating the preemption.[72]

D. Standing to Sue in Connection with Tender Offers

The Code would change existing tender offer law by expressly recognizing the rights of various private litigants to bring suit for equitable relief and damages. Neither section 14(e) nor any other section of the Williams Act expressly created a private right of action for equitable relief or damages. Nevertheless, the courts have found an implied right of target companies[73] and offerors[74] contesting unfriendly offers to sue for injunctive relief. Standing to seek equitable relief has also been extended to those participating in a tender offer even before an "actual" offer has been made.[75]

Despite this apparent trend toward expanding the class of plaintiffs that have standing under section 14(e), the Supreme Court in the recent case of *Piper v. Chris-Craft Industries, Inc.*,[76] held that the implied right of action for damages under section 14(e) did not extend to a competing tender offeror. In late 1968 and in 1969 Chris-Craft sought control of Piper Aircraft Corporation, but the Piper family, which owned thirty-four percent of the Piper Aircraft stock, bitterly fought Chris-Craft's takeover attempt and eventually encouraged Bangor Punta Corporation to make a competing tender offer for the common stock. Bangor Punta ultimately gained

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the doctrine of federal abstention may be an impediment. *See* Hicks v. Miranda, 422 U.S. 332 (1975); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); B. Coleman Corp. v. Walker, 400 F. Supp. 1355 (N.D. Ill. 1975).

71. *See* Letter from SEC Chairman Roderick Hills to Senator William Proxmire (Apr. 17, 1976).

72. TD-3 § 1603(c)(1) & Comment (10); RD 1-3 § 1603(c)(1).

73. *See, e.g.*, Jewelcor Inc. v. Pearlman, 397 F. Supp. 221 (S.D.N.Y. 1975).

74. *See, e.g.*, Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969).

75. *See* Anaconda Co. v. Crane Co., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,364 (S.D.N.Y. 1975) (holding an exchange offeror had standing to seek injunctive relief against target company during pre-effective period); ICM Realty v. Cabot, Cabot & Forbes Land Trust, [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,585 (S.D.N.Y. 1974) (holding target had standing to sue putative offeror although actual tender offer had not commenced). *But see* Levine v. Seilon, Inc., 439 F.2d 328 (2d Cir. 1971). The issue was raised in General Cable v. Microdot, Civ. Action No. 75-399 (D. Conn. 1975), but became moot before it was decided. In view of the increased applicability of "waiting periods" imposed by state takeover statutes and the pre-notice period provided for in the Antitrust Improvements Act, the significance of such "pre-offer standing" is readily apparent. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383.

76. 45 U.S.L.W. 4182 (U.S. Feb. 23, 1977).

control of Piper, but only after several alleged violations of the securities laws that appeared to be actionable under the general antifraud provisions of section 14(e). Chris-Craft sued the Piper family, Bangor Punta, and Bangor Punta's investment banker, and after protracted and complex litigation[77] was awarded substantial damages by the Second Circuit.[78]

The Supreme Court reversed this decision. Relying upon the *Cort v. Ash*[79] analysis of whether a private right of action is implied in a particular statute, the Court found that the legislative history of the Williams Act did not indicate an express intent on the part of Congress to extend the protections and benefits of section 14(e) to competing offerors such as Chris-Craft. The Court observed, however, that the denial of the private cause of action under section 14(e) did not leave Chris-Craft without a legal remedy since Chris-Craft could sue under common law principles of interference with prospective commercial advantage. The Court expressly refused to consider whether shareholder-offerees or the target corporation have standing to sue for damages[80] or whether a competing offeror could sue for injunctive relief.[81]

The Code would resolve all questions of implied standing to seek relief in connection with tender offers by granting statutory standing to all "interested persons,"[82] thus including (i) companies that are the subject of a tender request or of a *proposed tender request,* or those companies that have shareholders required to file a Schedule 13D under Code section 604(b),[83] (ii) shareholders of these companies, (iii) shareholders that have tendered, (iv) companies that have made or propose to make tender requests, and (v) any

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77. Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 516 F.2d 172 (2d Cir. 1975), *rev'd,* 45 U.S.L.W. 4182 (U.S. Feb. 23, 1977); Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir.), *cert. denied,* 414 U.S. 910 (1973); Chris-Craft Indus., Inc. v. Bangor Punta Corp., 426 F.2d 569 (2d Cir. 1970); Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 384 F. Supp. 507 (S.D.N.Y. 1974); Chris-Craft Indus. Inc. v. Piper Aircraft Corp., 337 F. Supp. 1128 (S.D.N.Y. 1971); Chris-Craft Indus. Inc. v. Piper Aircraft Corp., 303 F. Supp. 191 (S.D.N.Y. 1969). *See also* SEC v. Bangor Punta Corp., 331 F. Supp. 1154 (S.D.N.Y. 1971).

78. 516 F.2d at 185-90.

79. 422 U.S. 66 (1975).

80. 45 U.S.L.W. at 4193 n.28.

81. 45 U.S.L.W. at 4194 n.33. Ironically, Chris-Craft abandoned its claim for injunctive relief at a pre-trial hearing before the district court's decision on liability, apparently convinced that injunctive relief would not be granted because damages would serve as adequate relief. 337 F. Supp. at 1136 n.8.

82. RD 1-3 § 1412(b).

83. This would codify standing for a target to seek redress for the failure of shareholders to file a Schedule 13D and for the filing of false information. *See* GAF v. Millstein, 453 F.2d 709 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972).

other interested persons. In addition, the Code expressly provides that one with standing may be granted almost any relief imaginable.[84] In view of the Code's liberal relief provisions, several limitations on the availability of relief should be noted. The first limitation applies only to damages and provides that "[a] buyer or seller may not obtain damages under [section 1412] to the extent that he has an action under Sections 1402 to 1406 inclusive as a result of conduct actionable under this section." Accordingly, plaintiffs seeking damages must look first to those sections.[85]

The other limitations concern the availability of equitable relief in state courts. Although jurisdiction over actions brought under the Securities Exchange Act currently is vested exclusively in the federal courts, the Code confers concurrent jurisdiction on the state courts. The introduction of concurrent jurisdiction in the tender offer area could make unfriendly tender offers difficult to accomplish were it not for practical limitations on the use of state tribunals. Almost all tender offer complaints raise claims under the federal antitrust laws,[86] over which the federal courts retain exclusive jurisdiction.[87] Thus only those plaintiffs who do not intend to raise

84. The Code authorizes the courts to grant all "appropriate relief (preliminary or final), including a combination of the types of relief . . . specified," and expressly empowers a court to:

> (1) enjoin a violation or further violation, (2) require compliance, (3) enjoin the voting of securities acquired in violation or the consummation of action authorized by their having been voted, (4) set aside action so consummated, (5) award damages against the violator for any loss caused by his violation, or (6) grant other appropriate relief (preliminary or final), including a combination of the types of relief here specified.

TD-2 § 1412(b); RD 1-3 § 1412(b). Because this relief is available to all plaintiffs with standing, even a non-tendering shareholder could sue for money damages. *See* Fabrikant v. Jacobellis, [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,686 (E.D.N.Y. 1970); Neuman v. Electronic Speciality Co., [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,591 (N.D. Ill. 1969).

85. Although comment (4) to § 1412 states that a plaintiff seeking damages for a sale to a takeover bidder must look to § 1402 for damages, § 1402 does not provide for damages resulting from false statements made in connection with a tender request in violation of § 1301(a)(3). This apparent gap in the Code has not been explained.

86. Judge Friendly described the tendency of target companies to ward off unfriendly offers by raising antitrust claims in Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 854 (2d Cir. 1974):

> This appeal illustrates the growing practice of companies that have become the target of tender offers to seek shelter under § 7 of the Clayton Act, 15 U.S.C. § 18. Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or, if it persists, the long lapse of time could so change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no antitrust violation has been shown.

87. Although the federal antitrust laws may constitute a defense in state court proceed-

antitrust claims would benefit from the introduction of state court jurisdiction. In addition, state court jurisdiction undoubtedly will not be available in most cases to the intended beneficiary, the small damage plaintiff, or to the target company because alert defendants immediately will remove such cases to federal court.[88]

Further limitation on the state courts' ability to provide equitable relief are imposed expressly by the Code. Although the Code confers concurrent jurisdiction on the state courts, it simultaneously restricts the power of state judges to issue restraining orders or injunctions on less than ten days notice.[89] The purpose of this limitation is to prevent target companies from shopping for *ex parte* or other injunctive relief from state or local judges, who may be more willing to grant relief than their federal counterparts.[90] Although the ten day limitation would eliminate the problem of resort to the state courts by a target company for *ex parte* injunctive relief, it nevertheless would not resolve adequately the problem of forum shopping for preliminary injunctive relief issued on notice.

The effectiveness of the ten day requirement in eliminating forum shopping in state courts depends on whether an injunction issued after a ten day period would be an effective weapon for target companies. Because section 1518 was drafted at a time when an offer could be completed within ten days, the limitation could be expected to render state courts ineffective in granting injunctive relief. The recently enacted Antitrust Improvements Act, however, imposes on those tender offers subject to its provisions[91] a minimum

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ings, the state courts cannot grant affirmative relief. Because most plaintiffs who raise tender offer claims desire injunctive or other *affirmative* relief based on antitrust violations, the state courts would lack subject matter jurisdiction.

88. These cases are removable to federal court under 28 U.S.C. § 1441(b) (1970) because they involve federal questions and usually exceed $10,000 exclusive of interest and costs. If, however, the defendant corporation is incorporated in or has its principal place of business witbin the state in which suit is brought, the case could not be removed to federal court. *See* 28 U.S.C. § 1441(b).

89. TD-3 § 1518(a)(2); RD 1-3 § 1518(a)(2). Whether Congress constitutionally may limit state court remedies once concurrent jurisdiction is conferred remains unresolved.

90. *See* TD-3 § 1518(a), Comment 5:

> The arguments advanced in favor of exclusive jurisdiction on a Code-wide basis are (a) the complexity of the Code, which requires a degree of expertise not likely to be found in tbe state courts, and (b) the perhaps greater facility with which management in a proxy contest or a takeover bid situation might be able to persuade a state judge to grant a temporary restraining order, wbich is likely to derail the control bid because of the unfavorable publicity and market impact even though the order is vacated in a few days.
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> The latter contention is met by the "except" clause in § 1518(a)(2). And the former is outweighed by the desirability of giving the small claimant, particularly, a forum close to his home (as well as his lawyer's).

91. *See Highlights of the 1976 Antitrust Improvements Act*, 2 CORP. L. GUIDE (CCH) ¶ 11,529, at 16,711-12 (1976).

fifteen day "waiting period" during which shares of the target may not be purchased.[92] As a result, the Code's imposition of a ten day notice requirement does not prevent state judges from providing timely injunctive relief. In addition, the formal limitation on the power to issue injunctive relief may be circumvented by state courts, which continue to have available a variety of other tools that have the same effect, such as the informal persuasion that can be brought to bear on parties to prevent action that would render the court's ultimate determination moot.

E. "Saturday Night Specials" Under the Code

No area of tender offer law has been the subject of as much recent controversy as the quick offer, or Saturday night special, in which shareholders of the target company are given as few as seven days after the offer is commenced to make their investment decisions.[93] In spite of the controversy, the Code makes no changes in existing law. No minimum offering period is imposed expressly by the Williams Act, but sections 14(d)(5) and 14(d)(6) create that result through other means. Section 14(d)(5) permits shareholders to withdraw tendered shares until seven days[94] after the first definitive copies of the offer are published,[95] and section 14(d)(6) requires that all shares tendered during the first ten days of any tender offer for less than all the stock in an acquired company be purchased pro rata.[96] The Code continues the seven-day withdrawal period and the

92. The Commission has made a similar proposal that would increase the minimum length of an offer to fifteen days. *See* note 98 *infra*.

93. *See, e.g.*, the offer by Colt Industries, Inc. for Garlock, Inc., announced Novemher 18, 1975, to expire November 26, 1975.

94. The New York Stock Exchange requires that cash tender offers remain open for a minimum of 10 days, and the American Stock Exchange requires a minimum of 14 days.

95. Since the 7-day withdrawal period runs from the date the offer is first puhlished, the question of what constitutes sufficient publication may he decisive. In Missouri Portland Cement Co. v. H.K. Porter Co., No. 75-1027C(A) (E.D. Mo. Nov. 26, 1975), the court held that the offer must alert shareholders in the target company adequately before the seven-day withdrawal period is triggered. Thus Porter's offer, which was not brought to the attention of all current shareholders except hy newspaper publication, did not trigger the withdrawal period. *Compare with* Advanced Systems, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,653 (Dec. 17, 1973).

Proposed rule 14d-3(b) promulgates guidelines for determining when a tender offer will be considered published. 2 FED. SEC. L. REP (CCH) ¶ 24,282B (Aug. 2, 1976).

96. An 11-day offer does not violate the Williams Act. *See* Commonwealth Oil Refining Co. v. Tesoro Petroleum Corp., 394 F. Supp. 267, 274-75 n.1 (S.D.N.Y. 1975). An eight-day offer, however, has been attacked recently as a manipulative act violating section 14(e). *See* Complaint in Garlock Inc. v. Colt Industries, 75 Civ.—Complaint ¶ 35 (S.D.N.Y. 1975) (Garlock charged that Colt's eight-day offer was "deliberately designed to panic shareholders into making a quick decision to tender their shares without having time to reflect upon their terms . . . .").

ten day pro rata requirement in section 605, which was included in the first draft of the Code in 1972 and thereafter has not been changed. This section is now outdated, however, because of two recent developments in this area of the law.

The first of these developments is a recent proposal by the SEC[97] that all offers remain open a minimum of fifteen *business* days,[98] that the withdrawal period be increased to ten days,[99] and that unaccepted shares may be withdrawn during the seven business days following a competing offer.[100] In addition, the Antitrust Improvements Act provides for a minimum fifteen-day waiting period during which shares of the target may not be purchased.

III. Soliciting of Proxies

Section 602 contains the provisions of the Code governing the solicitation of proxies and circularization of security holders. Section 602(a) provides that

> [i]n the absence of an exemption under section 602(i), section 602(b) to (g) inclusive applies to any person who solicits or permits the use of his name to solicit a proxy, or circularizes security holders to take action, to fail to object, dissent, or vote, or otherwise to refrain from taking action, in respect of a security of a registrant that is part of a class of securities with at least one hundred holders (or a security of a subsidiary of a registered holding company).[101]

The Reporter notes in his comments that section 602(a) expands the scope of proxy regulation.[102] This section accomplishes that expansion in several ways. First, section 602(a) applies to solicitations of any class of the *registrant's* securities, provided that the class is held by at least one hundred persons. The applicability of section 602, therefore, depends upon the company's status as a registrant. Section 602 thus reflects the Code's conceptual shift from the registration of securities to the registration of companies. In contrast to section 602(a), the provisions of Commission Regulation 14A apply only to solicitations of proxies "with respect to securities registered pursuant to section 12 of the [Exchange] Act. . . ."[103] Because section 602(a) applies only to classes of a

97. SEC Securities Act Release No. 5731 (Aug. 2, 1976), [Current] Fed. Sec. L. Rep. (CCH) ¶ 80,659.
98. *Id.* at 86,714-15.
99. *Id.* at 86,715.
100. *Id.*
101. TD-1 § 602(a).
102. TD-1 § 602(a), Comment 1.
103. 17 C.F.R. § 240.14a-2 (1976).

registrant's securities held by more than one hundred persons, classes of preferred stock and debt securities privately placed by a registrant generally will be exempt from its requirements. In light of this exemption, registrants should not find the expansive scope of the section unduly burdensome.

Secondly, section 602(a) expands the scope of proxy regulation by codifying the concept of "circularizing" security holders "to take action, to fail to object, dissent, or vote, or otherwise to refrain from taking action. . . ."[104] The Reporter has noted that the concept of circularizing security holders "is not quite covered by the definitions of 'proxy' and 'solicitation'. . . ."[105] Section 299.3 defines the term "solicitation" to include

> (a) a request for a proxy, whether or not accompanied by or included in a form of proxy, (b) a request to execute, not to execute, to revoke, or not to revoke, a proxy, or (c) the furnishing of a . . . communication to a security holder . . . under circumstances reasonably calculated to result in the giving, withholding, or revocation of a proxy. . . .[106]

A "proxy" in turn is defined by section 281 to include "a consent, authorization, or power of attorney."[107] Most communications to security holders occur in circumstances "reasonably calculated to result in the giving, withholding, or revocation of a proxy. . ." and would fall within the definition of "solicitation" provided by section 299.3(c).[108] Because, however, circularization occurs whenever a person communicates with security holders for the purpose of inducing

104. TD-1 § 602(a).

105. TD-1 § 602(a), Comment 3.

106. TD-1 § 299.3; RD 1-3 § 299.3.

107. TD-1 § 281; RD 1-3 § 281. The Code's definition of a proxy is more limited than the definition in rule 14a-1, which states that: "The term 'proxy' includes every proxy, *consent* or *authorization* within the meaning of section 14(a) of the act. The consent or authorization may take the form of failure to object or to dissent." 17 C.F.R. § 240.14a-1(d) (1976) (emphasis added). The broad definition of proxy in rule 14a-1 brings many communications to shareholders within the provisions of regulation 14A. *See, e.g.,* Sargent v. Genesco, Inc., 492 F.2d 750, 767-68 (5th Cir. 1974) (for the purposes of determining whether the complaint stated a claim upon which relief could he granted, the court held that a letter from the company's management, which described the terms of a proposed refinancing plan and allegedly lulled the company's shareholders into inaction on the plan, could constitute a solicitation of an authorization or consent).

108. *See, e.g.,* SEC v. Okin, 132 F.2d 784, 786 (2d Cir. 1943) (communications that do not solicit proxies may be subject to regulation if they are part of "a continuous plan ending in solicitation and which prepare the way for its success."). *But cf.* Smallwood v. Pearl Brewing Co., 489 F.2d 579, 601 (5th Cir. 1974) (communications which are "innocuous" and "not overwhelmingly prejudicial" are not subject to proxy regulation); Brown v. Chicago R.I. & P.R.R., 328 F.2d 122, 125 (7th Cir. 1964) (an advertisement the purpose of which was "to inform and motivate the public" was not "'reasonably calculated to result in the procurement' of proxies").

any action concerning a security of the registrant,[109] the concept of circularizing security holders reaches conduct not embraced by the definition of "solicitation" in section 299.3(c). For example, in the event that a registrant defaults in the payment of dividends on a class of preferred stock, communications with holders of that preferred stock to alert them of their right to elect a director probably would constitute circularization.[110]

Solicitations or circularizations in respect of "a security of a subsidiary of a registered holding company. . ." also are subject to regulation by section 602.[111] Further, the Reporter believes that "the clause 'in respect of a security of a registrant' is broad enough to cover any (non-utility) holding company's or investment company's solicitation of *its own* security holders for instructions or advice on how it should vote a *portfolio* security."[112]

Present law contains very little statutory regulation of the solicitation of proxies; indeed, section 14(a) of the Exchange Act merely forbids any person from soliciting proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. . . ."[113] Pursuant to the authority granted in section 14(a) of the Exchange Act, the Commission adopted Regulation 14A, which governs the solicitation of proxies.[114] The Reporter has stated that section 602 "attempts a reasonable amount of codification of the [Commission's] rules [regulating the solicitation of proxies] without effectively diminishing the degree of flexibility or administrative authority."[115] The Reporter has acknowledged, however, that "the Code's provisions will . . . have to be fleshed out by rules pursuant to § 602(b)."[116] Section 602(b) makes it "unlawful to

109. Analysis of the concept of "circularizing security holders" will benefit from the decisions developing the concept of "soliciting a consent or authorization." *See, e.g.,* Dunning v. Rafton, [1964-1966 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,660, at 95,437 (N.D. Cal. 1965) ("solicitation of consents would, according to common usage, include any *circularizations* requesting or urging a security holder to concur in or go along with the solicitor's proposals") (emphasis added). *See also* Greater Iowa Corp. v. McLendon, 378 F.2d 783, 796-98 (8th Cir. 1967).

110. Excessive regulation of communications from management to security holders and communication hetween security holders increases the risk that management's disclosures will be untimely and contact between security holders will decrease. *See* Smallwood v. Pearl Brewing Co., 489 F.2d 579, 600-01 (5th Cir. 1974).

111. TD-1 § 602(a); RD 1-3 § 602(a).

112. TD-1 § 602(a), Comment 2.

113. 15 U.S.C. § 78n(a) (1970).

114. Regulation 14A: Solicitation of Proxies, 17 C.F.R. § 240.14a-1 (1976).

115. TD-1 § 602, General Comment 1.

116. *Id.*

engage in any conduct within section 602(a) in contravention of the rules . . . of the Commission,"[117] and the content of the subsections of section 602 depend upon rulemaking by the Commission.

Section 602(c) requires a proxy statement to contain "whatever information, financial statements, material contracts, and other documents the Commission specifies by rule," although a proxy statement "may contain material that is not required."[118] To the extent that section 602(c) depends upon the Commission's rules to establish the content of the proxy, that section carries rule 14a-3 and Schedule 14A intact into the Code.

Section 602(d) regulates the form of proxy and requires that all proxies

> comply with the rules of the Commission and, except to the extent that the Commission provides otherwise by rule, [to] (1) indicate whether or not it is solicited on behalf of the management, (2) provide a specifically designated blank space for its dating, (3) identify clearly and impartially every matter or group of related matters intended to be acted upon, whether proposed by the management or by a security holder, and (4) provide means whereby the security holder is afforded an opportunity to specify a choice between approval and disapproval of each matter or group of related matters referred to therein as intended to be acted upon.[119]

Section 602(d) has preserved all the material elements of rules 14a-4(a) and 14a-4(b)(1). As the Reporter notes, however, section 602(d) is silent on two requirements presently found in rule 14a-4. First, section 602(d)(3) does not address the question whether a proxy may confer discretionary authority to vote on certain matters.[120] Secondly, unless the Commission adopts a rule similar to rule 14a-4(b)(1),[121] officer elections would be subject to the provisions of section 602(d)(4). Because of "the current turmoil with respect to shareholders' nominations and their role generally. . ." these questions have been left to the Commission's "rule-making and exemptive powers. . . ."[122]

The filing requirements of rule 14a-6 probably will not be changed by adoption of the Code, since section 602(e) requires only that "[e]very form of proxy and proxy statement and any other material used in soliciting or circularizing security holders be filed

117. TD-1 § 602(b); RD 1-3 § 602(b).
118. TD-1 § 602(c); RD 1-3 § 602(c).
119. TD-1 § 602(d); RD 1-3 § 602(d).
120. *Compare* TD-1 § 602(d)(3) *and* RD 1-3 § 602(d)(3) *with* Rule 14a-4(a) & (c), 17 C.F.R. § 240.14a-4(a) & (c) (1976).
121. 17 C.F.R. § 240.14a-4(b)(1) (1976).
122. TD-1 § 602(d), Comment.

at whatever time (which may be in advance of their use) the rules of the Commission prescribe."[123]

Certain subsections of section 602 do not depend on rulemaking by the Commission for their content, nor are there any exceptions to their application. Following the substance of rule 14a-10,[124] section 602(f) proscribes the solicitation of "(1) an undated or post-dated proxy, or (2) a proxy that provides that it is considered to be dated as of a date after the date on which it is signed by the security holder."[125] Similarly, section 602(g) codifies rule 14a-4(e)[126] by requiring that the "proxy statement or form of proxy . . . provide, subject to reasonable and specified conditions, that the securities in question (1) will be voted, and (2) will be voted in accordance with any specification made pursuant to section 602(d)(4)."[127] Finally, under section 602(h), if a registrant does not solicit proxies from all holders of a class of securities subject to section 602(a), and who are entitled to vote at an annual or other meeting, "the registrant, in accordance with the rules of the Commission, [must] file and transmit to all such holders a statement containing information substantially equivalent to that required under section 602(c)."[128]

Section 602(i) sets forth the exemptions to section 602(b) through (h). These exemptions are drawn primarily from section 14(a) of the Exchange Act and rule 14a-2. Section 602(i)(1) follows the substance of section 14(a) of the Exchange Act and exempts solicitations and circularizations of "holders of an exempted security as defined in section 301" from the regulatory provisions of section 602(b) through (h).[129] Similarly, section 602(i)(3) codifies rule 14a-2(d)[130] by exempting solicitations and circularizations "involved in the offer or sale of a certificate of deposit or other security that is the subject of an offering statement or of a transaction exempted under section 511(e)."[131] Section 602(i)(4) carries the

123. TD-1 § 602(e); RD 1-3 § 602(e).

124. 17 C.F.R. § 240.14a-10 (1976).

125. TD-1 § 602(f); RD 1-3 § 602(f).

126. 17 C.F.R. § 240.14a-4(e) (1976).

127. TD-1 § 602(g); RD 1-3 § 602(g).

128. TD-1 § 602(h); RD 1-3 § 602(h). *Compare* 15 U.S.C. § 78n(c) (1970); Regulation 14C: Distribution of Information Pursuant to Section 14(c), 17 C.F.R. § 240.14c-1 to -101 (1976).

129. TD-1 § 602(i)(1); RD 1-3 § 602(i)(1).

130. 17 C.F.R. § 240.14a-2(d) (1976).

131. TD-1 § 602(i)(3); RD 1-3 § 602(i)(3). The Reporter notes that the reference in § 602(i)(3) to § 511(e), which originally dealt in part with the issuance of securities pursuant to a plan of reorganization in bankruptcy, was "necessitated by the expansion in coverage in case the activity in question (supervised as it is) might be construed as 'solicitation' or 'circularization.'" TD-1 § 602(i)(3), Comment.

substance of rule 14a-2(f)[132] into the Code, exempting solicitations and circularizations "subject to section 602(j) except as the Commission provides otherwise by order."[133] The exemption in section 602(i)(5) for solicitations and circularizations "subject to the jurisdiction of a court under the Bankruptcy Act or rules thereunder"[134] amalgamates and broadens[135] the exemptions provided by rule 14a-2(e)[136] and section 77(f) of the Bankruptcy Act.[137] Subsections (7) and (9) of section 602(i) are derived from subsections (b) and (c) of rule 14a-2[138] and provide exemptions for solicitations by and to beneficial owners of securities. Section 602(i)(7) supplies specific exemption for solicitations or circularizations "by the beneficial owner of the security in question, or by a person who will be the beneficial owner when any proxy is used."[139] With only slight modification,[140] section 602(i)(9) adopts the language of rule 14a-2(b) and permits the record holder of a security to solicit a proxy from the beneficial owner.[141] Section 602(i)(10) modestly expands the exemption provided in rule 14a-2(g)[142] by permitting solicitations or circularizations

> by means of *a writing* that states from whom a proxy statement, form of proxy, and any other soliciting material may be obtained and in addition does no more than name the issuer, state the reason for the writing, and identify every proposal to be acted upon by security holders.[143]

Finally, section 602(i)(11) preserves the important exemption in rule 14a-2(a)[144] for solicitations and circularizations "of not more than ten persons otherwise than by or on behalf of the management."[145]

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132. 17 C.F.R. § 240.14a-2(f) (1976). Rule 14a-2(f) exempts "[a]ny solicitation which is subject to Rule U-62 under the Public Utility Holding Company Act of 1935." *Id.*

133. TD-1 § 602(i)(4); RD 1-3 § 602(i)(4).

134. TD-1 § 602(i)(5); RD 1-3 § 602(i)(5).

135. TD-1 § 602(i)(5), Comment.

136. 17 C.F.R. § 240.14a-2(e) (1976).

137. Bankruptcy Act § 77(f), 11 U.S.C. § 205(f) (1970).

138. 17 C.F.R. § 240.14a-2(b) to 2(c).

139. TD-1 § 602(i)(7); RD 1-3 § 602(i)(7). The Reporter notes that "[t]he reference to future beneficial ownership is designed to take care of the tender request situation." TD-1 § 602(i)(7), Comment.

140. TD-1 § 602(i)(9), Comment.

141. TD-1 § 602(i)(9); RD 1-3 § 602(i)(9).

142. 17 C.F.R. § 240.14a-2(g) (1976). The exemption in rule 14a-2(g) is confined to solicitations "through the medium of a *newspaper advertisement.*" *Id.* (emphasis added).

143. TD-1 § 602(i)(10); RD 1-3 § 602(i)(10) (emphasis added).

144. 17 C.F.R. § 240.14a-2(a) (1976).

145. TD-1 § 602(i)(11); RD 1-3 § 602(i)(11). "[T]he purpose of this limited exemption is merely to permit the organization of security holder committees." TD-1 § 602(i)(11), Comment.

Section 602(i) has introduced two exemptions not found in rule 14a-2. Section 602(i)(2) provides an exemption for solicitations or circularizations "of holders of a debt security (whether or not it is also an equity security) not traded in an organized market, except insofar as they have a right under state law to vote with respect to the particular matter that is the subject of the solicitation."[146] This exemption was "necessitated by the expansion of the coverage of the proxy rules to cover any class of a registrant's securities with 100 holders" and "is designed to avoid interfering with activities that might be construed as 'solicitation' or 'circularization' of creditors in an attempt to avoid bankruptcy proceedings."[147] The second new exemption in section 602(i) is found in subsection (8), which permits the solicitation or circularization "of security holders in a class or stockholder's derivative action if the solicitation or circularization is under judicial supervision pursuant to a Federal or State statute or rule."[148] Completing the list of exemptions found in section 602(i), subsection (6) exempts solicitations and circularizations "subject to approval of the Interstate Commerce Commission under section 20b of the Interstate Commerce Act as amended."[149]

Unless the conditions prescribed in section 602(j) are satisfied,[150] no person may

> solicit or permit the use of his name to solicit a proxy, deposit, or dissent in respect of a reorganization plan of a registered holding company or a subsidiary, whether under section 1208 [Holding Co. Act § 11] or otherwise, or in respect of a plan under section 1208 for divestment of control, securities, or other assets, or for the dissolution of a registered holding company or a subsidiary.[151]

Section 602 concludes with subsection (k), which states the general rule that "[n]othing in [section 602] or the rules thereunder prevents any person from appearing before the Commission or a court through an attorney."[152]

Certain subdivisions of rule 14a are not codified by section 602. For example, the provisions of rule 14a-3 dealing with the form, content, and filing of the issuer's annual report[153] have been

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146. TD-1 § 602(i)(2); RD 1-3 § 602(i)(2).

147. TD-1 § 602(i)(2), Comment. The final clause of § 602(i)(2) was added to prevent conflict between that subsection and the "corporation statutes of a few states that permit the giving of voting rights to debenture holders." *Id.*

148. TD-1 § 602(i)(8); RD 1-3 § 602(i)(8); *see* TD-1 § 602(i)(8), Comment.

149. TD-1 § 602(i)(6); RD 1-3 § 602(i)(6).

150. *See* TD-1 § 602(j)(1)-(2); RD 1-3 § 602(j)(1)-(2).

151. TD-1 § 602(j); RD 1-3 § 602(j).

152. RD 1-3 § 602(k).

153. 17 C.F.R. § 240.14a-3(b) to -3(c) (1976).

"replaced by the direct authority given the Commission over those reports in § 601(b)."[154] Similarly, the prohibitions in rule 14a-9 against false and misleading proxy statements[155] and against representations that the Commission has passed on the merits of soliciting material[156] do not appear in section 602, but instead have been codified in Part XIII, Fraudulent and Manipulative Acts.[157] Section 602 contains none of the provisions of rule 14a-7,[158] regulating the mailing of shareholder statements by management, or of rule 14a-8,[159] regulating shareholder proposals. Although rule 14a-7 is settled and probably could be codified,[160] the Reporter has noted that the content of rule 14a-8 "is very fluid at the moment—especially [with respect to] 'social' proposals—and it might not be too desirable to codify Rule 14a-7 while ignoring Rule 14a-8."[161] To the extent that shareholders are unable under rule 14a-8 to include their proposals in management's proxy, the provisions of rule 14a-7 that compel management to mail shareholder communications or to divulge the list of shareholders are crucial. Because of this relationship between rules 14a-7 and 14a-8, the Reporter's reluctance to codify rule 14a-7 without codifying rule 14a-8 is justifiable.[162] Finally, section 602 does not codify the provision of rule 14a-11[163] regulating contested elections.

After considering whether section 602 should grant the Commission "quasi-judicial authority in [the regulation of solicitations

154. TD-1 § 602, General Comment 3. The comment refers to § 601(b), rather than to § 601(a), which appears more appropriate.

155. 17 C.F.R. § 240.14a-9(a) (1976).

156. *Id.* § 240.14a-9(b).

157. TD-1 § 602, General Comment 3. Certain subdivisions of rule 14a have been adopted in sections other than § 602. Compare the creation of a privilege in Part XVI of the Code for "a person who is required to publish another's defamatory material" pursuant to rules adopted by the Commission under the authority delegated in § 602. TD-1, § 602, General Comment 5. Rules 14a-7(b)(3) and 14a-8(b) attempt to create such a privilege, *see* 17 C.F.R. § 240.14a-7(b)(3) & 14a-8(h) (1976), but the "Commission's authority to create a privilege by rule is questionable," TD-1, § 602, Comment 5.

158. 17 C.F.R. § 240.14a-7 (1976).

159. *Id.* § 240.14a-8.

160. TD-1 § 602, General Comment 4.

161. *Id.* The Commission recently has adopted amendments to rule 14a-8. *See* 41 Fed. Reg. 52,994 (1976) (to be codified in 17 C.F.R. § 240.14a-8). *See also* 41 Fed. Reg. 29,982 (1976). *See generally* Allen, *The Proxy System and the Promotion of Social Goals,* 26 Bus. Law. 481 (1970); Note, *Proxy Rule 14a-8: Omission of Shareholder Proposals,* 84 Harv. L. Rev. 700 (1971).

162. The Reporter has indicated that rules 14a-7 and 14a-8 may "well be reexamined at a later stage in the Code's progress." TD-1 § 602, General Comment 4.

163. 17 C.F.R. § 240.14a-11 (1976).

and circularizations] comparable to its authority with respect to registration statements,"[164] the Reporter

> was inclined to the view that the desideratum of minimizing delay of stockholder meetings, together with the greater speed that a court of equity can display as compared with quasi-judicial proceedings at the administrative level, justifies retention of the present system of administration and enforcement of the proxy rules.[165]

Section 603 regulates communications with beneficial owners and assures that such owners will receive statements required by other sections of the Code. The Commission is empowered by 603(a) to

> require that a registrant furnish an appropriate number of copies of
> (1) every report required to be sent to security holders under section 601(a)(2),
> (2) every proxy statement under section 602(c) . . ., and
> (3) every statement under section 602(h) to every record holder of its securities . . . that the registrant knows or can reasonably ascertain to be holding the securities for the account of another person.[166]

Section 603(b)(2) in turn defines the record holder's duty by prohibiting any person from failing, in contravention of the Commission's rules, "to send a report or other communication of a registrant to another person for whose account he carries a security."[167] Finally, section 603(b)(1) retains the substance of section 14(b) of the Exchange Act and expands its reach by making it unlawful for any person, in contravention of the Commission's rules, to "give or refrain from giving a proxy with respect to a security of a registrant held for the account of another person."[168]

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164. TD-1 § 602, General Comment 6.
165. *Id.*
166. TD-1 § 603(a); RD 1-3 § 603(a).
167. TD-1 § 603(b)(2); RD 1-3 § 603(b)(2).
168. TD-1 § 603(b)(1); RD 1-3 § 603(b)(1). *See* § 14(b) of the Exchange Act, which requires only that "any member of a national securities exchange, or any broker or dealer . . . give, or . . . refrain from giving a proxy . . . ." 15 U.S.C. § 78n(b) (1970).