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## Take-Over Bid Disclosure Act

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## TAKE-OVER-BID DISCLOSURE ACT

The recent changes in the Take-Over Bid Disclosure Act<sup>1</sup> by the General Assembly in its 1978 session are essentially a return to the shorter time limit requirements that existed prior to the 1977 amendment to the Virginia Code.<sup>2</sup> As before, the offeror company which is contemplating a take-over of another corporation's stock [hereinafter referred to as the target corporation] must file with the State Corporation Commission [hereinafter referred to as SCC] and with the registered agent of the target corporation a statement which contains all information required by § 13.1-531(b).<sup>3</sup> This filing must be made twenty days prior to such a bid instead of sixty days as previously required.<sup>4</sup> Under the 1977 Code, after receipt of this statement, the SCC or target corporation had thirty days in which to order or request a hearing. This has now been reduced to ten days.<sup>5</sup> The subsequent hearing will have to begin within forty days<sup>6</sup> instead of the sixty allowed under the 1977 Code.<sup>7</sup> Furthermore, the new provision requires a decision in the SCC hearing to be made within twenty-five days from the conclusion of the hearing and the filing of post hearing briefs.<sup>8</sup> This last provision is a new addition and will prevent unnecessary delay that could hinder the offeror from making its stock purchase.<sup>9</sup>

The new Code allows an offeror to file a Schedule 14-D-1 of the Securities Exchange Act of 1934 with the SCC in lieu of the § 13.1-531(b) required disclosure statement if the offeror was required to file the former statement

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1. VA. CODE ANN. §§ 13.1-528 to -540 (Cum. Supp. 1978). For a discussion of the Virginia statute, see Gibson & Freeman, *Business Association, The Thirteenth Annual Survey of Virginia Law*, 54 VA. L. REV. 1224 (1968); Comment, *Take-Over Bids in Virginia*, 26 WASH. & LEE L. REV. 323 (1969); Freeman, *Business Association, The Fifteenth Annual Survey of Virginia Law*, 56 VA. L. REV. 1536 (1970); Vaughan, *State Regulation of Tender Offers*, 3 SECURITIES L. REV. 475 (1971); Moylan, *State Regulation of Tender Offers*, 8 SECURITIES L. REV. 813, 819-21 (1976). For a discussion of take-over bid disclosure acts in general, see Wilner & Landy, *The Tender Trap: State Takeover Statutes and their Constitutionality*, 45 FORDHAM L. REV. 1 (1976); Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213 (1977) [hereinafter cited as Langevoort]; Note, *The Indiana Business Takeover Act*, 51 INDIANA L. J. 1051 (1976). See also, Kintzel, *Virginia Takeover Law May Be Liberalized*, Richmond News Leader, March 4, 1978, at 5.

2. VA. CODE ANN. §§ 13.1-528 to 540 (Cum. Supp. 1976).

3. VA. CODE ANN. §§ 13.1-531(a) (Cum. Supp. 1978).

4. VA. CODE ANN. § 13.1-531(a) (Cum. Supp. 1976).

5. VA. CODE ANN. § 13.1-531(a)(i) (Cum. Supp. 1978).

6. *Id.* § 13.1-534(b).

7. VA. CODE ANN. § 13.1-534(b) (Cum. Supp. 1976).

8. VA. CODE ANN. § 13.1-534(b) (Cum. Supp. 1978).

9. This delay was blamed for the failure of Congoleum to takeover Universal Leaf Tobacco Co. in the recent case in Richmond. See *Universal Leaf Tobacco Co. v. Congoleum Corp.*, 554 F.2d 1283, (4th Cir. 1977).

with the Securities and Exchange Commission.<sup>10</sup> A new general purpose section was included stating that the purpose of this Act was to "protect the interests of offerees, investors and the public by requiring that an offeror make fair, full and effective disclosure to offerees of all information material to a decision to accept or reject a take-over bid."<sup>11</sup>

These changes should strengthen the Act against constitutional challenge. The status of such acts has been threatened by the recent decision in *Great Western United Corp. v. Kidwell*<sup>12</sup> where a federal District Court in Texas declared the Idaho Take-Over Bid Disclosure Act to be unconstitutional. The District Court held that the Idaho statute was preempted by the Williams Act,<sup>13</sup> an act adopted by Congress in 1968 as an amendment to the Securities Exchange Act of 1934.<sup>14</sup>

The Williams Act does not require disclosure to a government agency or the target company prior to an offer to the shareholders. According to its provisions, certain information must be disclosed which would enable an investor to make a reasonable decision as to whether he should sell or retain his shares. Such information includes: the identity of the persons on whose behalf purchases are to be effected; the source and amount of funds put up by the offeror; any plans to liquidate, sell or merge the corporation; the amount of shares already owned by the offeror; and any contracts between the offeror and target corporation.<sup>15</sup> But again, this information need only be filed at the time the bid is made, and then only when the acquisition will amount to five percent of the outstanding stock.<sup>16</sup>

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10. VA. CODE ANN. § 13.1-531(b) (Cum. Supp. 1978).

11. *Id.* § 13.1-528(B). The purpose of this act is to protect all stockholders of businesses incorporated under Virginia law. Although it has an effect on stockholders in other states, its primary concern is to protect shareholders in Virginia and the corporations who are objects of unwanted takeover bids. Note, *The Indiana Business Takeover Act*, 51 INDIANA L. J. 1051, 1063-64 (1976). Shareholders of target corporations will benefit by receiving bona fide information disclosing the major factors involved in the selling of stock.

12. 439 F. Supp. 420 (N.D. Texas 1977).

13. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1971)).

14. For a discussion of the Williams Act, see Wilner & Landy, *supra* note 1, at 2 (n.7)-3, 30-31; Note, *Tender Offer Regulation—Injunction Standards Under the Williams Act*, 45 FORDHAM L. REV. 51 (1976); Wander, *Selecting Targets and Shaping Strategy in Corporate Take-Overs: Securities Law Considerations*, 3 SECURITIES L. REV. 403 (1971); Langevoort, *supra* note 1, at 216-18.

The Williams Act requires anyone who is to become an owner of five percent or more of any class of securities of a company registered with the Securities Exchange Commission under its 1934 Act to file with the SEC and the target company within ten days after obtaining that level of ownership. 15 U.S.C. §78M (d)(1)(1971).

15. 15 U.S.C. §78M (d)(1971); *Great Western United Corp. v. Kidwell*, 439 F. Supp. 420 (N.D. Texas 1977).

16. 15 U.S.C. §78M (d)(1) (1971).

In *Great Western* the District Court felt that the Idaho statute conflicted with the Williams Act by upsetting the balance between the offeror and the management of the target corporation.<sup>17</sup> Specifically, the court noted that under the Idaho statute more detailed information was needed.<sup>18</sup> It created a waiting period after the filing of the applicable information until the registration statement was declared effective, and an offeror was exempt from compliance with the act if the target corporation's board of directors recommended acceptance of the offer to its shareholders.<sup>19</sup> The target corporation's board of directors could also demand a hearing thereby causing unnecessary delays. The cumulative effect of such provisions was to inhibit tender offers and thereby benefit management by placing delay mechanisms in their hands.<sup>20</sup> By creating a waiting period and allowing the target corporation's management to demand a hearing, the statute caused unnecessary delay. If a hearing was required, more delay and more costs were incurred. It also allowed the target corporation's management additional time to mount a defense, to solicit stockholder support, or make its own offer to the shareholders.<sup>21</sup>

The Court also held that the Idaho statute conflicted with the Commerce Clause of the United States Constitution.<sup>22</sup> The statute was found to have a substantial effect on interstate commerce by preventing an offeror from making a tender offer anywhere in or outside of the state until the statute's provisions were complied with. No legitimate local interest could be found.<sup>23</sup> Instead of protecting the shareholders of target corporations incorporated in, or having significant connections with, the state, the statute enabled management to delay and frustrate the making of an offer; it discouraged offerors from making bids because of the additional requirements and delay that could result. It was felt that it discouraged an offeror from submitting his top offer, since he could disclose his top offer to the management, get their approval, and then offer a lesser price to shareholders.<sup>24</sup> Also, the offeror might reduce his initial offer if he encountered delays

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17. *Great Western United Corp. v. Kidwell*, 439 F. Supp. 420, 437 (N.D. Texas 1977). Take-Over Bid Disclosure Acts in general were felt to be unconstitutional on the grounds that they had been preempted and that they interfered with interstate commerce. See Langevoort, *supra* note 1, at 241-57; Moylan, *State Regulation of Tender Offers*, 8 SECURITIES L. REV. 813, 825-28 (1976); Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1, 15-32 (1976); Note, *The Indiana Takeover Act*, 51 INDIANA L. J. 1051, 1075-1102 (1976).

18. *Great Western United Corp. v. Kidwell*, 439 F. Supp. 420, 436 (N.D. Texas 1977).

19. *Id.*

20. *Id.* at 437.

21. *Id.* at 439.

22. *Id.* at 438.

23. *Id.*

24. *Id.*

resulting from management stalling tactics. Because the statute was found to have no legitimate, local interest and did have a substantial effect on interstate commerce, the Court did not even have to balance the interstate burden against the state benefit in order to find the Idaho statute unconstitutional.<sup>25</sup>

While the Virginia statute is similar to Idaho's, it is different in various respects. Virginia permits the management of the target corporation to ask for a hearing, but it must be requested in good faith, because the SCC can find that no good cause for a hearing exists.<sup>26</sup> The time periods are now shorter<sup>27</sup> and a decision by the SCC must be given within twenty-five days. These requirements tighten the act so that an offeror will know before making his bid exactly how long it will take to get approval, and can plan accordingly. Virginia exempts those offers where the board of directors of the target corporation recommends acceptance to its stockholders, as long as the consent of at least two-thirds of the stockholders has been achieved by proxy solicitation.<sup>28</sup> This stockholder consent requirement substantially changes the control of the target corporation management, control which was objected to in *Great Western*.<sup>29</sup>

The Virginia act is more preventive of possible fraudulent practices than the Williams Act. The latter is basically an informational, filing requirement. By allowing a hearing, the Virginia act brings in the SCC which will be in a position to make an impartial decision as to whether the offerors have complied with all necessary procedures.

Most state take-over bid disclosure acts apply to all transactions between the offeror and the target corporation's shareholders, provided the target is considered a local enterprise.<sup>30</sup> All statutes control offers to shareholders of corporations incorporated in that state, and most statutes regulate bids if the corporation has its principal place of business and/or sub-

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25. *Id.* at 439. The District Court applied the test used in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970): if a statute attempts to regulate a legitimate local interest and has only an incidental effect on interstate commerce, it will be upheld unless the burden on such commerce clearly exceeds the local benefits. *Id.* at 142.

26. VA. CODE ANN. § 13.1-531(a)(ii) (Cum. Supp. 1978); Langevoort, *supra* note 1, at 231.

27. The length of time under the 1977 Code was almost indeterminable since the hearing, if required, did not have to begin until sixty days after filing, and no time period was given to limit the length of time after the hearing to render a decision. Under the 1978 Code, the hearing must begin within forty days from the time of filing and a decision made within twenty-five days of the conclusion of the hearing. The hearing itself is not limited. See VA. CODE ANN. § 13.1-534(b) (Cum. Supp. 1978).

28. VA. CODE ANN. § 13.1-529(b)(V) (Cum. Supp. 1978).

29. *Great Western United Corp. v. Kidwell*, 439 F. Supp. 420, 437-39 (N.D. Texas 1977).

30. Langevoort, *supra* note 1, at 219.

stantial assets in the state.<sup>31</sup> The Virginia statute applies only to corporations doing business in the state.<sup>32</sup> Although there is still an impact on interstate commerce, the recently adopted legislation is not as pervasive as the Idaho statute. By retaining a narrow application, the statute should more readily adhere to its avowed purpose—protection of stockholders of Virginia corporations.

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31. Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, *supra* note 1, at 19.

32. VA. CODE ANN. § 13.1-529(e) (Cum. Supp. 1978).

