UNIFORM TAKE-OVER ACT

Adopted October 14, 1981

Sec. 1. Short Title

This Act may be cited as the [State] Uniform Take-Over Act.

Sec. 2. Purpose

The purpose of this Act is to provide protection to offerees and to the public by requiring that an offeror make full, fair and effective disclosure of all material facts necessary for the making of an informed decision about a take-over offer and to provide substantive rights of withdrawal and pro-ration to offerees where such rights are not accorded to them under federal law.

Sec. 3. Definitions

As used in this Act, unless the context otherwise requires, the term:

(a) "Administrator" means the Securities Administrator of this State.

(b) "Affiliate" means any person controlling, controlled by, or under common control with another person.

(c) "Associate" means:

(i) Any corporation or other organization of which the offeror is an officer, director or partner, or is, directly or indirectly, the record or beneficial owner of ten percentum or more of any class of equity securities;

(ii) Any person who is, directly or indirectly, the record or beneficial owner of ten percentum or more of any class of equity securities of the offeror;

(iii) Any trust or other estate in which the offeror has a substantial beneficial interest or for which the offeror serves as a trustee or in a similar fiduciary capacity; or,

(iv) Any relative or spouse of the offeror or any relative of such spouse who has the same home as the offeror.

(d) "Beneficial owner" includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has, shares, or has the right to acquire:

(i) Voting power which includes the power to vote, or to direct the voting of, an equity security; or,

(ii) Investment power which includes the power to dispose, or to direct the disposition of an equity security.

(e) "Control", including the terms "controlling", "controlled by", and "under common control with", means the possession of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(f) "Equity securities" means:

(i) In the case of a corporation, any securities issued by the corporation that represent an ownership interest in the corporation and to which are attached the right to vote on any matter, or any securities of the corporation that are convertible into such securities, including any warrant or right to subscribe to or purchase such securities; or,

(ii) In the case of a subject company which is not a corporation, any securities issued by such subject company that represent an interest in it and to which are attached the right to vote on any matter, or any securities issued by such subject company that are convertible into such securities of it, including any warrant or right to subscribe to or purchase such securities.

(g) "Offeree" means a person who is a record or beneficial owner of the equity securities of the subject company for which a take-over offer is made.

(h) "Offeror" means a person who makes a take-over offer, and includes two or more persons:

(i) Who make a take-over offer jointly or in concert; or

(ii) Who intend to exercise jointly or in concert any voting rights attached to the equity securities for which a take-over offer is made.

(i) "Person" means an individual, a partnership, a corporation, an unincorporated association, a trust, or any other entity or associate or affiliate of a person.

(j) "Take-over offer" means an offer to purchase or a request or an invitation to tender made by an offeror or his agent to offerees which, if accepted, will result in the offeror becoming directly or indirectly the record or beneficial owner of more than five percentum of any class of outstanding equity securities of the subject company.

(k) "Subject company" means an issuer of equity securities organized under the laws of this State whose equity securities are sought to be purchased in a take-over offer. The administrator may promulgate by order, rule or regulation any additional criteria, such as, but not limited to, the number or percentage of offerees residing in this State, that must exist before the issuer may be deemed a "subject company."

(l) The "date of commencement" shall be the earliest date on which a take-over offer is either published, sent or given to offerees in a manner in which offerees can tender their equity securities pursuant to the take-over offer.

Sec. 4. Exemptions From Registration Requirements

The following transactions are exempted from the registration requirements of this Act:

(a) An offer made by an issuer to purchase its own equity securities or the equity securities of a subsidiary at least two thirds of the equity securities of which are owned either of record or beneficially by the issuer;

(b) Purchases by a broker registered with the Securities and Exchange Commission acting in an agency capacity to acquire any equity security in a transaction on a stock exchange or in the over-the-counter market if the broker performs only the customary broker's function and receives no more than the customary broker's commission, provided that such acquisition is made by such broker in good faith and not for the purpose of avoidance of §3(j) by the broker or the principal and neither the principal nor the broker

solicits or arranges for the solicitation of orders to sell equity securities of the subject company;

(c) An offer to purchase equity securities of an issuer having less than 100 stockholders of record;

(d) An offer or offers to purchase equity securities which, if accepted, will result in the offeror purchasing two percentum or less of the outstanding equity securities of such class during the preceding twelve month period;

(e) An offer which the administrator by order, after notice to the offeror and to the subject company and opportunity to respond, shall exempt from the provisions of this Act as not being made, or to be made, for the purpose of, and not having the effect of, or to have the effect of, changing or influencing the control of the subject company, or otherwise as not comprehended within the purposes of this Act;

(f) An offer which is subject to substantive administrative review of its terms and conditions by a federal or state agency and which the administrator determines by rule, regulation, or order has met the purposes of this Act.

Sec. 5. Registration Statement and Related Filings

(a) No person shall make a take-over offer unless as soon as practicable on the date of commencement of the take-over offer, a registration statement containing the information required by §5(b) has been filed with the administrator and delivered to the subject company.

(b) The registration statement shall make full, fair, and effective disclosure of all material facts necessary for the making of an informed decision about the take-over offer and shall be in the form as may be prescribed by the administrator and shall contain the following information:

(i) a detailed description of the organization, capitalization and operations of the offeror, including:

(1) its name and principal business address;

(2) the date, form and jurisdiction of its organization;

(3) a description of each class of its equity and debt;

(4) the names of all directors and executive officers or those serving similar functions and a description of their material affiliations during the past five years and a description of the approximate amount of any material interest, direct or indirect, of any of such persons in any material transaction during the past five years or any proposed material transaction to which the offeror or any affiliate or associate was or is to be a party;

(5) a description of the business of the offeror and its affiliates and associates, the general development of their businesses and any material changes therein during the past five years;

(6) a description of the location and general character of the principal properties of the offeror and its affiliates and associates;

(7) a description of any pending judicial or administrative proceeding, other than routine litigation, to which the offeror or any affiliate or associate is a party or to which any of their property is subject, including any proceeding which the offeror knows or has reason to know is being contemplated by any governmental authority;

(8) a description of any judicial or administrative proceeding during the past 5 years, other than routine litigation, to which the offeror or any affiliate or associate was a party and which resulted in an adverse order, decree, or judgment;

(9) a description of any criminal proceeding (excluding traffic violations) in which the offeror or any affiliate or associate or any officer or director, or those serving a similar function, of the offeror or any affiliate or associate was convicted or entered a plea of guilty or nolo contendere;

(10) a description of any tender offer made by the offeror or any affiliate or associate in the past 5 years and of any acquisition of another business made by the offeror or any affiliate or associate in the past 5 years and any material change in the organization or operation of such business;

(11) copies of such financial statements which the administrator may require, not to exceed audited balance sheets and income statements for each of the five most recent fiscal years and, for any period ending more than ninety days prior to the date of filing the registration statement, an interim balance sheet and income statement covering the period from the date of the last audited balance sheet and income statement to a date within ninety days of filing the registration statement.

(ii) a detailed description of the source and amount of funds or other consideration to be used in acquiring the equity securities of the subject company, including:

(1) a description of any securities which are being offered in exchange for the equity securities of the subject company;

(2) if any part of the funds or consideration will be represented by borrowed funds or consideration, a description of the transaction and the parties thereto;

(iii) a statement of the purpose of the take-over offer, including a description of any plan or proposal the offeror has to liquidate, merge or consolidate the subject company; to sell or transfer any material portion of its assets; to make any material change in its business or its structure, including its directors, executive officers or other personnel;

(iv) a description of any interest of the offeror or any affiliate or associate in the equity securities of the subject company, including:

(1) the number of equity securities of which the offeror or any associate or affiliate is the record or beneficial owner, or has the right to acquire directly or indirectly, the dates of acquisition and the consideration paid;

(2) any contracts, arrangements or understandings with any person with respect to any equity securities of the subject company including transfer of any such securities, joint venture, loan or option arrangements, puts or calls, guarantees of losses, guarantee against loss or guarantees of profits, division of losses

or profits, the giving or withholding of proxies, voting arrangements or employment arrangements, identifying the persons with whom such contracts, arrangements or understandings have been entered into, and the details thereof;

(v) a description of any contracts, arrangements, understandings, or negotiations with any person who is an officer, director, administrator, manager, executive employee or record or beneficial owner of equity securities of the subject company with respect to the tender of any equity securities of the subject company, the purchase by the offeror of any equity securities owned by that person otherwise than pursuant to the take-over offer, the retention of any person in his present position or in any other management position or with respect to that person giving or withholding a favorable recommendation to the take-over offer, or the election or designation of any person as a director, or any similar function, of the subject company;

(vi) a description of the provisions made or to be made for communicating the take-over offer to offerees, including:

(1) the identity of all persons employed, retained, or compensated by the offeror or by any other person on its behalf to make solicitations of or recommendations to offerees regarding the take-over offer and a description of the material terms of such employment, retainer or arrangements;

(2) copies of all written materials to be used in soliciting offerees;

(vii) any other information, data, documents or exhibits which the administrator may require to be filed.

(c) If any material change occurs in the information contained in the registration statement, the offeror shall file promptly with the administrator and deliver to the subject company an amendment to the registration statement describing such change.

(d) The administrator may permit the omission of any information required to be included in the registration statement if he determines that such

information is immaterial or otherwise unnecessary for the protection of offerees.

(e) In connection with any take-over offer which is subject to Section 14(d) of the Securities Exchange Act of 1934, (15 USC §78n(d)), the administrator may permit an offeror to file any statement required to be filed with the Securities and Exchange Commission with such additions or modifications as the administrator may require consistent with §2 of this Act, in lieu of the registration statement prescribed by subsection (b) of this section.

Sec. 6. Orders of Public Hearing

Within 15 days of the filing of a registration statement pursuant to §5 or §8 of this Act, the administrator may by order schedule a public hearing concerning any take-over offer for the purpose of determining compliance with the requirements of this Act, and whether the offeror has provided full, fair and effective disclosure of all material facts necessary for the making of an informed decision about the take-over offer, including the filing of a complete and accurate registration statement. Any initial hearing shall commence within 25 days of the filing of a registration statement.

Sec. 7. Prohibition of Purchase or Payment

(a) The administrator may in his discretion issue an order prohibiting an offeror from purchasing or paying for any equity securities tendered in response to its take-over offer. Such order may be issued at any time prior to such purchase of or payment for such tendered securities, but in no event after 60 days after the filing of the registration statement.

(b) Any order issued by the administrator pursuant to subsection (a) of this section prohibiting an offeror from purchasing or paying for any equity securities tendered in response to its take-over offer shall automatically expire unless within 30 days of the completion of a hearing or investigation held pursuant to §6 or §12(b) respectively of this Act or 60 days after the filing of the registration statement, whichever is sooner, the administrator shall have determined that there has not been compliance with the requirements of this Act, and shall have issued an order containing his findings of fact and conclusions of law prohibiting the purchase and payment for any equity securities tendered in response to the take-over offer or

conditioning any such purchase and payment upon changes or modifications in the registration statement.

Sec. 8. Requirements for Certain Take-Over Offers

The following provisions shall also apply to take-over offers that are not subject to §14(d) of the Securities Exchange Act of 1934, (15 USC §78n(d)):

(a) No person shall make a take-over offer unless as soon as practicable on the date of commencement of the take-over offer, a registration statement containing the information in §5(b) has been filed with the administrator, delivered to the subject company, and sent, published or given to offerees in a form and manner as may be required by rule or regulation of the administrator;

(b) If any material change occurs in the information contained in the registration statement, the offeror shall file promptly with the administrator an amendment to the registration statement describing such change and send, publish or give such information to offerees and the subject company in a form and manner as may be required by rule or regulation of the administrator;

(c) The take-over offer shall be made to all offerees of the same class or series equity securities on substantially the same terms;

(d) The period of time within which equity securities may be deposited pursuant to a take-over offer shall not be less than 20 business days;

(e) Equity securities deposited pursuant to a take-over offer may be withdrawn by an offeree by demand in writing to the offeror or the depository at any time within 15 business days after the date of the first invitation to deposit such securities and at any time after 60 days after the date of the first invitation to deposit such securities if the shares have not been purchased or paid for, and within 10 business days following the date of commencement of another offeror's take-over offer for the same equity securities;

(f) Where a take-over offer is made for less than all the outstanding equity securities of a class and where a greater number of such securities is deposited pursuant thereto than the offeror is bound or willing to take up and pay for, the equity securities taken up by the offeror shall be taken up as

nearly as possible on a pro rata basis, disregarding fractions, according to the number of equity securities deposited by each offeree;

(g) Where an offeror varies the terms of a take-over offer before its expiration date by increasing the consideration offered to offerees, the offeror shall pay the increased consideration for all equity securities accepted, whether such securities have been accepted by the offeror before or after the variation in the terms of the offer;

(h) The administrator may, by rule or regulation, prohibit an offeror from purchasing equity securities of the subject conpany other than by the take-over offer during the course of such take-over offer.

Sec. 9. Civil Liabilities

(a) An offeror who makes a take-over offer that does not comply in all material respects with the provisions of §5 or §8 of this Act; or who makes a take-over offer by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading (the offeree not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know of such untruth or omission, and in the exercise of reasonable care could not have known of such untruth or omission; or any person, including a subject company, who violates any provision of this Act shall be liable to any offeree whose equity securities are sold to the offeror pursuant to the take-over offer or shall be liable to any other person, including an offeror, damaged by such violation.

(b) Such offeree or other person may sue either at law or in equity and shall be entitled:

(i) to recover such equity securities, together with all dividends, interest or other payments received thereon upon the tender of the consideration received for such securities from the offeror; or

(ii) if the offeror no longer owns the equity securities, to recover such damages as the offeree shall have sustained as the proximate result of the conduct of the offeror which is in violation of this Act;

(iii) to recover any damages sustained as the proximate result of the conduct of any other person in violation of this Act.

(c) No civil action shall be maintained under this section unless commenced before the expiration of two years after the act or transaction constituting the violation.

(d) A person who successfully brings an action under this section shall be entitled to recover reasonable costs and attorney fees.

(e) The rights and remedies of this Act are in addition to any other rights or remedies that may exist at law or equity.

Sec. 10. Injunctions and Civil Liability

(a) Whenever it appears to the administrator that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Act, the administrator may in the administrator's discretion bring an action in any court of competent jurisdiction to enjoin such act or practice, to enforce compliance with this Act, and to impose a civil penalty not to exceed $100,000.00, or the administrator may refer such evidence as is available concerning violations of this Act to the Attorney General, who may, with or without such a reference, bring such an action. A subject company, an offeror or an offeree shall also have standing to bring an action in any court of competent jurisdiction to enjoin any person from any act or practice which constitutes a violation of this Act.

(b) Upon a proper showing, the court may (1) grant a permanent or temporary injunction or restraining [order]; (2) order rescission of any sales or purchases of equity securities determined to be unlawful under this Act; (3) impose a civil penalty not to exceed $100,000.00; and (4) award such other relief as it may deem just and proper, including directing the subject company to refuse to transfer such securities on its books and to refuse to recognize any vote with respect to such securities.

Sec. 11. Fraudulent, Deceptive or Manipulative Acts

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading, or to

engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any take-over offer, or any solicitation of offerees in opposition to or in favor of any such offer. For the purposes of this section, the administrator may, by rules and regulations, define and prescribe means reasonably designed to prevent such acts and practices as are fraudulent, deceptive or manipulative.

Sec. 12. Fees, Rules, Regulations, Forms, Orders and Investigations

(a) This Act shall be administered by the administrator who may promulgate rules, regulations forms and orders necessary to carry out the purposes and provisions of this Act and who may set and charge such fees as the administrator shall deem reasonable and proper, considering the additional expense to the administrator by the filing of a registration statement by an offeror, but no such filing fee may exceed $3,000.

(b) In administering this Act, the administrator may conduct any investigation which the administrator deems appropriate, consistent with §2 of this Act. In connection with any such investigation, the administrator may require persons to file statements in writing and under oath with the administrator's office; require and receive such data and information as the administrator may deem relevant; and subpoena witnesses, compel their attendance, examine them under oath and require the production of books, records or papers.

Sec. 13. Violations—Penalties

Every person who wilfully violates any provision of this Act, or any order, rule or regulation issued pursuant thereto, shall be guilty of a felony.

Sec. 14. Validity—Savings Clause

In the event any provision or application of this Act shall be held illegal or invalid for any reason, such holding shall not affect the legality or validity of any other provision or application thereof.

*****

.01 Statement of Position of the North American Securities Administrators Association, Inc., Relating to Changes in Federal Law and Regulation Concerning Takeovers, as Adopted by Its Membership on April 23, 1983 at Its Spring Conference in Washington, D.C. The North American Securities Administrators Association, Inc. (NASAA), whose membership includes the securities administrators of the fifty States, is committed to furthering investor protection through the adoption of uniform securities regulatory policies and licensing procedures as well as mutual assistance in instituting effective enforcement action against securities law violators. Thirty-seven of the NASAA member states also have enacted state laws in the field of tender offer/take-over regulation for the protection of public investors beginning in 1968, and have had extensive experience and involvement with the issues, problems and abuses that have arisen in that area during the course of administrative proceedings and court actions.

Over the past several years, NASAA, through its Tender Offer Committee, has actively represented the interests of the states in the field of tender offer and take-over regulation. The Association's activities have included the adoption of a Uniform State Take-Over Act and the filing of an *amicus curiae* brief with the U.S. Supreme Court in support of the Illinois Take-Over Law. The decision in that case, *Edgar v. MITE Corp.,* was handed down in June of 1982 and in a 5-4 decision held the Illinois Law to be invalid under the Commerce Clause of the Constitution on the ground that the Illinois statute imposed an indirect but substantial burden on interstate commerce which outweighed its argued benefits. Although the language of the decision in *MITE* ostensibly allowed room for some state involvement in the regulation of tender offers, the extent of any state's regulatory role at this point is uncertain due to divergent views expressed in several of the concurring opinions in the case. Further, several subsequent federal and state court decisions involving other state take-over laws have added to the confusion by, in knee-jerk fashion, merely citing *MITE* and striking down any state law that had effect outside the state without careful analysis of the facts and law of each individual case.

Against that background, there have been several recent events and developments in the tender offer area which lead NASAA to conclude that the current federal take-over regulatory scheme as set forth in the Williams Act and regulations adopted under the federal Securities Exchange Act of 1934—which has not been significantly amended in the 15 years of its existence—requires a number of specific changes to

remedy problems that the federal scheme fails to address and the attendant abuses to shareholders that currently exist.

Although the effect of *MITE* on the authority of state securities administrators in the take-over field is of extreme importance to NASAA, contrary to the perception of some commentators that the controversy between state and federal authority is a turf battle, NASAA, at least, does not seek authority in the take-over area as an end unto itself. We believe that under the present circumstances, and with the interest of shareholder protection as our paramount concern, that if the recommendations which we will set forth herein are adopted and the enumerated abuses significantly curtailed then specific state take-over legislation which would be able to fit within the constitutional parameters of *MITE,* need not be our primary concern or objective. We seek to eliminate these abuses by whatever means possible, whether by the actions of the SEC or by the enactment of amendments to the Williams Act and not by state take-over statutes alone. We are making our recommendations directly to the SEC, to its special advisory panel and to the Congress. The frenetic take-over battle between Bendix Corporation and Martin Marietta Corporation in late-1982 together with the advent in mid-1982 of offers using the so-called "two-tier pricing" mechanism have resulted in the spectre of corporate America and the securities markets, together with confused public investors, being confronted by the following abusive practices: (1) rush-to-judgment decisions being required of investors with inadequate time for consideration; (2) confusing pro-ration pools in take-overs involving competing offers; (3) predatory "two-tier pricing" in offers; (4) so-called "creeping" tender offers which the courts and the Securities Exchange Commission are unable to come to grips with; (5) toothless stock ownership reporting requirements which result in filings that in many instances are confusing, non-informative and/or misleading, but where little effective action or sanctions have been taken or instituted by courts or the Securities and Exchange Commission when violations have been established; (6) billions of dollars of a scarce national resource—namely, financing capital—being spent to play "corporate Monopoly" and used for empire-building—capital that is not used to build new manufacturing plants, add to the local tax base or to create new jobs, but rather serves to provide ego-gratification for some chief executive officers and to concentrate economic wealth and power; (7) a federal tax policy that furthers take-overs by permitting the write-off of the interest expense incurred in repaying the bank loans which financed the take-over; and (8) the management of both bidders and targets often forsaking their fiduciary obligations to the shareholders of corporate America as exemplified by the existence of such

things as "green mail" repurchases by a target of its shares from a hostile bidder, "golden parachute" compensation packages to management upon a change in control, bidders mortgaging their company's future by incurring heavy debt to finance acquisitions, and defensive tactics by targets including selling off the target's "crown jewels," and engaging in so-called "Pac-man" defenses. The fiduciary responsibilities of management are called into question because these major corporate actions are usually undertaken in the absence of shareholder ratification.

In view of the abuses that are currently prevalent in the take-over area, NASAA believes there are a number of specific actions that can and should be taken at the federal level to alleviate these problems. It is the position of NASAA through its Tender Offer Committee that the situation is at a critical point and that the following changes in federal law be immediately considered and implemented:

(1) *Extension of Time Periods.* The Williams Act presently provides for a twenty-day minimum offering period. Such a period is too short, however, to ensure that information about an offer and its effects can be fully disseminated to and understood by offerees, particularly when there are subsequent material changes in the offer or disclosure terms. In addition, the Williams Act time periods do not adequately protect shareholders when there are multiple bids by competing offerors. Extensions of the various time periods presently in effect would be of significant benefit to shareholders, the marketplace, and to the investing public generally.

(2) *Two-Tiered Offers.* Such offers typically involve a cash payment at a significant premium over the existing market price for a target's shares to obtain a desired percent of the shares, and usually provide for cash or for stock, debentures or other securities of the bidder in the second part of the offer that are of substantially less value than the first tier price. Frequently, the nature of any securities to be offered in the second tier is inadequately disclosed at the outset of the offer, and it may be impossible for offerees to evaluate the value of the securities in the second tier of the offer and to compare competing offers. Further, as a practical matter, target company shareholders in such offers are stampeded into tendering in order to make sure they receive the first tier price for at least part of their shares in the event the bidder is successful in obtaining the minimum number of shares it seeks. It is the Committee's view that two-tiered offers involving substantially different first tier and second tier prices or values should be designated as *per se* manipulative under

the federal securities laws and should be prohibited. Recent amendments to the Securities and Exchange Commission Rule 14D-8 requiring the *pro-ration* requirement to be open for the full term of the offer helps but does not eliminate the above-cited problems created by two-tier offers.

(3) *Prior Filing and Review of the Offering by the SEC or Under Anti-Trust Laws.* Under the present federal take-over regulatory scheme, bidders are compelled to commence an offer (or announce that they will not proceed) within five days of the time they publicly announce their intention to make an offer, and a bidder may commence its offer without prior SEC review of the adequacy of the disclosures relating to the offer or its terms and conditions. As a result, the current federal take-over law scheme, rather than being "neutral" as it claims to be, provides substantial advantages to bidders in terms of preparation time and the element of surprise. Further, the federal timing scheme puts significant pressure on target company shareholders to tender their shares as soon as possible, even though there may be subsequent material changes in terms of the offer or in the information disclosed, and where competing offers develop. The Committee believes that the Williams Act should be amended to require a prospective bidder to file with the SEC at least twenty days prior to commencing an offer. Such a time period would provide sufficient time for review by the SEC and for "digestion" of the offer by the marketplace and by shareholders. Alternatively, the pre-offer filing and review concept could be incorporated into the existing pre-merger notification and review procedures under the Hart-Scott-Rodino Antitrust Act.

(4) *Definition of Tender Offer.* Currently, neither the Williams Act nor SEC rules define a "tender offer." Consequently, it is uncertain what types of acquisitions are covered by the law—a situation which has created as a problem area so-called "creeping" tender offers. To date, attempts to remedy this problem have been on a case-by-case basis through the application by courts of informal SEC criteria for determining what constitutes a tender offer. However, because the lack of formality and precision of the SEC guidelines and the lack of uniform interpretation and application by the courts, there have been and continue to be innumerable instances of purchasers who have been able to take advantage of this shortcoming in the federal law to consolidate large (sometimes controlling) blocks of a corporation's shares to the detriment of its public shareholders. To remedy this situation, the Williams Act should be amended to include a clear definition of the types of acquisitions that trigger the substantive requirements of the Act. The Committee believes that the Act should be made applicable to acquisitions by

whatever means, such as open market or privately negotiated purchases, as well as the "classic" tender offers for a designated percentage of a target company's shares. This would allow all shareholders the opportunity to knowledgeably participate in the acquisition by a purchaser of control of their company, rather than having such control be acquired via purchases from unknowing shareholders in the marketplace, or from institutional investors who sell large blocks of shares in privately negotiated transactions to an acquiror.

(5) *Effective Remedies and Sanctions for Misleading Ownership Information Disclosures.* The present federal law filing requirements fail to provide sufficient remedies and sanctions for inadequate or improper disclosures by a person acquiring 5% or more of the shares of a publicly-held company with respect to such things as the acquiror's intentions to seek control of the target company and other significant material information. Courts, even after finding that material misstatements or omissions have taken place have done little more than require disclosure amendments and have seldom required the acquiror to give up the benefits of its illegal actions. Specific remedies and sanctions to deter such activity should be added to the Williams Act such as: preventing the voting of shares, rescission of open market take-overs and enjoining future acquisitions of shares.

(6) *State Standing to Sue in Federal Court for Federal Take-Over Law Violations.* At present, it appears that the SEC does not have sufficient resources to deal with all the problems arising from tender offers and take-over bids. Because states are closer and more accessible to the shareholders and the companies involved, they have a strong interest in preventing and resolving these problems. The Committee believes federal law should provide a mechanism for the states to represent their interests while possibly providing assistance to the SEC. This could be accomplished by a specific amendment to the Williams Act authorizing a state or states to file suit in federal court seeking injunctive relief against either a bidder or a target company for violations of federal law, similar to the recent amendments to the Commodity Exchange Act cooperatively developed by the states with the federal Commidity Futures Trading Commission. Those amendments specifically granted standing to states to institute actions in federal court against anti-fraud and certain other violations of that federal law. State standing under the Williams Act should, however, be limited to the state of incorporation of the target company or any state or group of states representing a substantial percentage of the target's shareholders and assets.

(7) *Restrictions on Bank Financing and Tax Treatment.* In the wake of the Marietta/Bendix spectacle, prominent business and political leaders and commentators have called for reforms in the banking, securities and tax laws. NASAA recommends that legislation at the federal level be considered and enacted to impact on tender offers in the following respects: (a) legislation similar to H.R. 1742 (98th Congress 1st Session) which amends the Credit Control Act to give the Federal Reserve Board authority to disapprove the extending of bank financing in connection with any acquisition or merger involving more than $100 million in financing, if the benefits to the public resulting from the acquisition or merger are outweighed by adverse effects. In a related area, Congressional Subcommittees already have called upon the Federal Reserve Board to interpret its existing regulations to curtail bank credit use for unproductive take-overs, and NASAA urges that such calls be continued until the Federal Reserve Board heeds them to properly utilize its existing powers in this area; and (b) amendments to the Internal Revenue Code which would disallow as a corporate business expense deduction, interest paid on loans used to finance a take-over.

(8) *Precluding Margin Purchases of Target Shares.* Shares of any company involved in a take-over bid should immediately subject to higher margin requirements or margin should be eliminated entirely. Speculators in these securities ordinarily have significantly more information or more timely knowledge of information available to them than unsophisticated target shareholders and should not be allowed to unfairly increase this advantage to the detriment of the unsophisticated shareholders by the ability to use credit to leverage the number of shares that may be acquired. The margin restriction would be triggered either by the public announcements of the tender offer or when 13D filings under the Williams Act indicate the acquisition of a prescribed percentage of shares indicating that the target company is the subject of an imminent take-over.

(9) " *Green Mail* ". Green mail is the popular name given to a practice developed by some corporate raiders involving the purchase of securities of a target in the open market and, in effect, forcing the target company to repurchase the shares by a mixture of threats of proxy and tender offer battles, shareholder litigation, liquidation, etc. The practice results in significant disruption in the target company's market price and in a waste of corporate assets in repurchasing its shares. To a certain extent, a broader definition of take-overs on the federal level as recommended above, should curb the practice. However, to eliminate the practice, NASAA believes that the Williams Act should clearly provide that acquisitions by a

person made with a view toward repurchase by the target company is a manipulative practice. It should also restrict repurchasing of shares from a bidder by the target company.

(10) *Golden Parachutes.* Golden parachutes are devices used by some target companies to try to fend off unwanted bidders. The term refers to extraordinarily munificent severance packages for the target company's management that are put into place prior to or during the course of a tender offer battle in order to make termination of the target companies executives extremely costly in the event the bidder is successful. This Committee believes golden parachutes involve a waste of a target company's assets and should be prohibited both by federal and state law changes.

*****

If our recommendations are ignored or if we believe that significant areas of abuse still exist, then we will be obliged to turn to the option of amending the Williams Act to provide for a state presence in take-overs as a response to *MITE.* Further, we will resist any attempts to preempt state corporate laws which deal with changes in corporate control.

Another concept to be explored is the implementation of an auction bidding process for target companies. Many of the abuses and problems generated by take-overs can be eliminated by developing a concept for a mechanism of filings under the Williams Act whereby once an announcement is made that a particular company is or will be the subject of a take-over bid by a bidder, a time frame and procedures would be established by which competing bidders may enter the auction place with all competing offers presented to the target shareholders at one time. Such mechanism would be designed to eliminate the present confusion of competing offers with differing expiration and pro-ration dates and inadequate time for evaluation by unsophisticated shareholders who depend on the receipt of information through the mails. The concept could attempt to assure that all bidders competing for the shares of a target be required to provide adequate information to target shareholders under equal time pressures with sufficient time for all shareholders to study all competing offers available to them in a reasonable manner.

NASAA believes that enactment on the federal level of these recommendations to remedy the current problems and abuses in the take-over area is vitally necessary

not only in the interest of public investors who are being victimized by them, but also is in the best interest of Corporate America in general which is currently engaged in a mass scramble for survival in the acquisition mania. Further, and perhaps more importantly, enactment of these recommendations is necessary in the best interest of the free enterprise system itself which has seen as the result of corporations feeding upon each other in the context of take-overs, the creation of ever-increasing concentrations of economic and financial power.

NASAA, through its Tender Offer Committee and its member states are available to discuss the details of the recommendations in this position paper.