

STATEMENT OF DONALD L. CALVIN, VICE PRESIDENT, NEW
YORK STOCK EXCHANGE, BEFORE THE SUBCOMMITTEE ON
SECURITIES OF THE SENATE COMMITTEE ON BANKING
AND CURRENCY ON SENATE BILL 3431

MARCH 25, 1970

My name is Donald L. Calvin. I am a Vice President of the New York Stock Exchange, 11 Wall Street, New York, New York. Phillip L. West, also Vice President of the Exchange and Director of the Department of Stock List, is with me. We appear here today to present the views of the Exchange on Senate Bill 3431.

The New York Stock Exchange supports this bill as we supported the earlier takeover bids bill, S. 510, and its predecessor, S. 2731, dating back to 1966. Senator Harrison Williams, as the sponsor of this legislation, is to be commended on his foresight as the developments since the passage of the Corporate Takeover Act (Public Law 90-439) have clearly shown that there was a need for legislation relating to corporate takeovers and that the Corporate Takeover Act has met that need.

The Exchange testified in favor of the earlier takeover bids bill before this Committee, and its counterpart in the House of Representatives, in 1967. In that testimony we made suggestions which were adopted by this Subcommittee which supported the objectives of the bill to provide full and timely disclosure

to stockholders whose companies are the subject of takeover bids. As you know, the Exchange has for many years required disclosure of material information which would affect investment decisions.

Our comments today, which are really only two in number, are of the same nature. Succinctly stated, the Exchange takes the following positions:

First, the Exchange does not object to changing the standard to require that anyone acquiring as much as 5 percent, rather than the present 10 percent, of a company's common stock must comply with the disclosure requirements of the Corporate Takeover Act. But, we suggest that the Committee consider imposing the 5 percent standard only for companies with assets in excess of (say) \$250 million. Also, the Exchange suggests that specialists on the Exchange or market makers in over-the-counter stocks be exempted from the requirements of the Corporate Takeover Act if the 5 percent standard is adopted.

Second, the Exchange does not object to the elimination of the exemption for tender offers registered under the Securities Act of 1933 but we suggest that the

seven day privilege of withdrawal should not be applied to 1933 Act registered offerings.

The proposed bill would require anyone acquiring as much as 5 percent of a company's common stock to comply with the disclosure requirements of the Corporate Takeover Act. This is a change in the present standard of 10 percent and a return to the standard originally proposed in S. 2731 which dates back to 1966. The Exchange does not oppose this change.

However, the objections which were voiced when the 5 percent standard was first proposed in S. 2731 in 1966 continue to have merit in some cases. The principal objection was that the 5 percent standard may impose the burden of filing notification statements and reports upon investors who do not intend to attempt to control or take over a company.

To mitigate this burden and still meet the legitimate need for disclosure, possibly the proposed 5 percent standard could be applied only to acquisitions of stock of "larger" corporations. In Senator Williams's statement on the floor preceding the introduction of S. 3431 on February 10, 1970, attention was drawn to the fact that large corporations have been the subject of takeover bids with increasing frequency. The statistics quoted dealt with corporations whose assets

exceeded \$250 million. The Sub-Committee might consider applying the proposed standard of 5 percent only to large corporations with assets of (say) \$250 million or some other appropriately high level. In this way, the 5 percent standard might not impose a burden on investors but would reach takeover bids for those corporations where 5 percent of the stock would be a substantial dollar amount. For smaller corporations, the present 10 percent standard would, of course, continue to apply.

The proposed 5 percent standard may also present problems for the specialists on the Exchange in their specialty stocks and market makers in over-the-counter stocks. The specialist on the Floor of the Exchange purchases and sells shares to maintain an orderly market. In periods of active markets, a specialist may acquire a substantial position, possibly in excess of 5 percent of the common stock of the corporation.

This will probably be more of a problem for market makers in smaller companies whose stock is traded over-the-counter. Further, compliance with the disclosure requirements of the Corporate Takeover Act by specialists or market makers in over-the-counter stocks achieves, in our opinion, no useful purpose.

Accordingly, we suggest that the bill be amended to include an exemption for specialists and for market makers in over-the-counter stocks.

The second area of our comment runs to Section 3 of the bill. That section will delete clause (A) of paragraph (8) of subsection (d) of Section 14 of the Securities Exchange Act of 1934. In effect, this deletion removes the exemption which is now accorded to tender offers which are registered under the Securities Act of 1933. This change must be considered in light of other requirements of the Corporate Takeover Act. Presently Section 14(d)(5) of the Corporate Takeover Act permits persons who have tendered shares to withdraw them at any time within seven days after the tender offer is made. This is intended to give persons who have tendered shares the right to withdraw in the first seven days in the event that further disclosures concerning the details of the offering are required by the SEC since there is no advance filing with the SEC of a cash tender prior to the announcement of the offering. The situation in connection with exchange offers registered under the '33 Act is entirely different in that the offering is not made until the registration statement is reviewed by the SEC. To allow the withdrawal of the tendered shares after the registration statement becomes effective would disrupt the market in the shares subject to the exchange offering. Further, to permit such a withdrawal gives to the shareholder the option of holding or withdrawing shares, depending on the market reaction to the tender offer. Tendering by a shareholder could thus become a speculative tool, and an unnecessary one.

Another reason given for permitting withdrawal in cash tenders is to allow shareholders to take advantage of subsequent offers. However, share for share exchanges are not normally the subject of counter offers.

Accordingly, if the exemption for registered tenders is eliminated, the seven day withdrawal privilege should not be applied to '33 Act registered offerings.

A further problem in this area is the possibility of duplicate filings with the SEC. If the exemption is removed, filings would be required under both the Securities Act of 1933 and the Corporate Takeover Act for the same offering. I would think the Commission would, in all probability, coordinate these filings at the Commission, but it may be advisable that this be done in the bill itself.

The Exchange, as stated at the outset, supports this bill, subject only to the foregoing comments. We have no problem with the other sections of the bill which bring insurance companies under the Act and broaden the SEC's rule-making authority.

We have no suggestions at the moment to further strengthen the Corporate Takeover Act, as it has, in our opinion, worked well in that it has improved the disclosures made in connection with takeovers and has not impeded legitimate corporate takeovers.