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SEC Rulemaking Authority and the Protection of Investors: A Comment on the Proposed "Going Private" Rules

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SEC Rulemaking Authority and the Protection of Investors: A Comment on the Proposed “Going Private” Rules

“Going private” is the term used to describe techniques whereby a publicly held corporation returns to private status by reacquisition of all publicly held stock, thereby excluding public shareholders from further participation in the enterprise.\(^1\) Going private programs have been undertaken (a) to alleviate a perceived incompatibility between prudent management and the pressures accompanying public ownership;\(^2\) (b) to free the corporation from the expense of complying with federal reporting requirements and to regain the confidentiality of corporate information;\(^3\) (c) to reconsolidate insider control; and (d) to profit from a successful share reacquisition program.\(^4\) A handful of highly publicized

\(^1\) Going private methods most commonly employed include tender offers for the reacquisition of outstanding shares, take-out mergers, and reverse stock splits. See generally Borden, Going Private—Old Tort, New Tort, or No Tort?, 49 N.Y.U.L. Rev. 987, 988 (1974) [hereinafter cited as Borden]. The first stage of a going private program is often a cash or debt tender offer. Stockholders who tender their shares during the life of the offer receive the offered price; the offerors have generally agreed among themselves not to tender the shares they hold. The offering group is therefore left as surviving shareholders in a privately held company. See Note, Going Private, 84 Yale L.J. 903, 907–11 (1975) [hereinafter cited as Going Private]. The second stage may find the controlling group undertaking to remove the remaining shareholders who have declined the offer to tender.

Alternatively, a repurchase program can lead to a majority decision in favor of merger or dissolution. State merger statutes set disclosure and procedural requirements for such transactions, allowing the transaction where a requisite majority of shareholders approves; some transactions trigger the appraisal remedy for dissenters. See Manning, The Shareholder’s Appraisal Remedy: An Essay for Frank Coker, 72 Yale L.J. 223, 262–65 (1962), for a classification by transaction of statutes giving rise to appraisal rights. See also Comment, “Going Private”: Establishing Federal Standards for the Forced Elimination of Public Investors, 1975 U. Ill. L.F. 638, 641–44 [hereinafter cited as Establishing Federal Standards]. A less common device is the reverse stock split, where a new security is exchanged for outstanding shares at such a rate that only the largest shareholders will survive the program holding more than a fractional interest. See, e.g., George Taylor Stewart v. Delta Steamship Lines, Civ. Act. No. 74-538 (D.D.C. April 29, 1974) (exchange rate of one new share for every 10,000 old shares). Unless the stockholder “rounds up”, i.e., invests additional money to increase his interest to the equivalent of a whole share of the new securities, his fractional interest can be forcibly acquired by the corporation pursuant to state law. Model Bus. Corp. Act Ann. 2d § 6(a) (1971); Del. Code Ann. tit. 8, §§ 160, 243 (1974); N.Y. Bus. Corp. §§ 513, 514 (McKinney 1963).

\(^2\) Borden at 1006–18. See also Going Private at 904–11.

\(^3\) In Kaufmann v. Lawrence, 386 F. Supp. 12 (S.D.N.Y. 1974), aff’d per curiam, 514 F.2d 283 (1975), the specific motive was to remove difficulties hampering acquisition negotiations as a result of reporting requirements under the federal securities laws, 386 F. Supp. at 14: more generally, management argued that its tender offer was a response to “special business problems inherent in the advertising business” and to changed conditions since it went public in 1968, Brief for Defendants-Appellees at 5–7 [on file with the INDIANA LAW JOURNAL].

\(^4\) SEC Commissioner A.A. Sommer, Jr., in discussing the offer made in Kaufmann, criti-
cases have involved dissenting shareholders pitted against their manage-ments’ efforts to go private. In all, more than 60 public companies sought private status in 1974 and 1975, and Banker’s Trust of New York estimated that market conditions in early 1975 made “potential candidates” of at least another 900 companies.

The increasingly frequent resort to going private has drawn sharp criticism, and the SEC announced in February 1975 that it would consider the adoption of rules governing the practice. The SEC proposes to require both the disclosure of certain information and compliance.

In one recent instance public offerings netted $696,000 for the corporation, over $125,000,000 for the offering shareholders. The corporation has now proposed to acquire all the stock held by minority shareholders for $11.00 per share. If all of the minority shareholders tender, they would receive $3.00 in cash and $8.00 in ten year subordinated debentures (which the company believes will sell at a substantial discount) for shares which were originally offered at $17.50 a share and three years ago at $21.75 a share; the dominant shareholder [Lawrence] would go from a 7% interest to 43%, with over 3.7 million dollars (less taxes) provided by the public now safely locked up for her benefit. On a pro forma basis, had all public shares been repurchased on the basis proposed at the beginning of 1973, the corporate profits attributable to her interest would have risen from $236,000 to $1,107,000 in 1973—over 400%—and from $167,000 to $688,000 for the first ten months of 1974—again over 400%—and without a single dime of additional investment by her!


7Hershman, Going Private—Or How to Squeeze Investors, DUN’S REVIEW, Jan. 1975, at 37.

8For example, Commissioner Sommer has characterized going private abuse as “serious, unfair, and sometimes disgraceful, a perversion of the whole process of public financing, and a course that inevitably is going to make the individual shareholder even more hostile to American corporate mores and the securities markets than he already is.” Sommer, supra note 4, at D-2. See also Hershman, supra note 7, at 37; Lee, Going Private, 42 FINANCIAL EXECUTIVE 10 (1974); Freeman, Going Private: Corporate Insiders Move to Eliminate Outside Shareholders, Wall Street Journal, Oct. 18, 1974, at 1, col. 6; Lee, Why Companies Want to Go Private, N.Y. Times, Sept. 15, 1974, § 3, at 14, col. 3.

9SEC Securities Act Release No. 5567 (February 6, 1975). The “rule 13e-3 transaction” to be regulated is set out in rule 13e-3A, subparagraphs (a), (b), (d); and rule 13e-3B, subparagraphs (b), (c). See APPENDIX A.

10Rule 13e-3A, subparagraphs (c)(1), (c)(3) (included in rule 13e-3B) are reproduced as APPENDIX B.
with substantive fairness requirements. The risks to shareholders’ rights and to public confidence in the securities markets posed by abuses of insider strength in going private transactions may mandate such federal administrative regulation. Neither existing SEC regulation nor state law has prevented corporate insiders from freezing out public shareholders, while often reaping substantial profits. Dissenters have generally lacked any remedy beyond the only occasionally adequate appraisal statutes. To determine whether federal regulation is warranted, and to make a rational choice between the alternative formulations offered in the proposed rules, requires consideration of the following issues: (a) how effectively do the proposed rules serve the policies underlying federal securities regulation; (b) does the SEC’s rulemaking authority extend to the regulation of substantive fairness; and (c) will the proposed rules serve to protect minority shareholders consistent with the demands of other federal policies? This note addresses these questions, and offers some conclusions regarding this proposed expansion of federal securities law.

11 Rule 13e-3A, subparagraph (c)(2):
(2) The consideration for the equity securities to be purchased shall constitute fair value to the security holders of such class of the issuer who are not affiliates as determined in good faith by the issuer or its affiliate, and shall be no lower than that recommended jointly by two qualified independent persons. Such persons, in recommending the consideration, shall consider, among other factors, the value of the assets and earning power of the issuer. They shall each:
   (i) after reasonable investigation, have reasonable grounds to believe, and believe, that their jointly recommended consideration constitutes fair value to the security holders of the issuer of such class who are not affiliates; and
   (ii) submit to the issuer a written report and an opinion based thereon regarding the fairness of the recommended consideration to security holders of the issuer of such class who are not affiliates, setting forth the procedures followed, the basis for and the method of arriving at the recommended consideration, and any limitation imposed by the issuer or affiliate on the scope of the investigation; such report and opinion shall be available for inspection and copying by any interested equity security holder of the issuer at the executive offices of the issuer during its regular business hours.

Rule 13e-3B, subparagraph (a):
(a) It shall be unlawful, as a fraudulent, deceptive or manipulative act or practice, for any issuer which has a class of equity securities registered under Section 12 of the Act or which files reports pursuant to Section 15(d) of the Act (the “issuer”) or any person controlling, controlled by or under common control with the issuer (an “affiliate”), to enter into any transaction involving a purchase, directly or indirectly, of any equity security of the issuer which does have, or is intended to have, any of the effects described in subsection (b) hereof unless:
   (1) if such transaction is entered into by the issuer, such issuer has a valid business purpose for doing so; and
   (2) the terms of such transaction, including any consideration to be paid to any security holder, are fair.


13 The alternative proposals offer significant differences, for example, in scope (compare 13e-3A (a) with 13e-3B (b)), and in the substantive fairness requirements to be applied (compare 13e-3A (c)(2) with 13e-3B (a)).
A fundamental obstacle to shareholders seeking relief from going private transactions has been the doctrine that the involuntary divestiture of a shareholder's interest in a corporation is merely one risk of investment.\textsuperscript{14} State corporation statutes permit such action where the requisite majority of stockholders approves the transaction,\textsuperscript{15} and courts are reluctant to strike such take-outs\textsuperscript{16} unless the transaction is shown to have been undertaken primarily to exclude the minority.\textsuperscript{17} State law has traditionally provided some protection for shareholders threatened by corporate transactions which effect a substantial change in the entity in which they have invested.\textsuperscript{18} But minority shareholders, by definition, cannot prevent even those transactions which require shareholder ap-

\textsuperscript{14}See, e.g., Grimes v. Donaldson, Lufkin & Jenrette, Inc., 392 F. Supp. 1393 (N.D. Fla. 1974): "[A] stockholder has no absolute rights to his interest in the corporation and may be forced to surrender his shares for a fair cash price." Id. at 1403.


\textsuperscript{16}Or, as these transactions are pejoratively termed, "freeze-outs," defined as "any action by those in control of the corporation which results in the termination of a stockholder's interest in the enterprise. . . . The term has come to imply a purpose to force a liquidation or sale of the stockholder's shares, not incident to some other wholesome business goal." Vorenberg, Exclusiveness of the Dissenting Stockholder's Appraisal Right, 77 Harv. L. Rev. 1189, 1192–93 (1964).

\textsuperscript{17}See, e.g., Theis v. Spokane Falls Gas Light Co., 34 Wash. 2d 23, 74 Pac. 1004 (1940). But see Blumenthal v. Roosevelt Hotel, Inc., 202 Misc. 988, 115 N.Y.S.2d 52 (Sup. Ct. 1952). See generally Note, Freezing Out Minority Shareholders, 74 Harv. L. Rev. 1630 (1961). Where it could not be demonstrated that such actions were pursuant to a "business purpose," however, courts have occasionally been willing to find a breach of the majority's fiduciary obligations to the minority. E.g., Bryan v. Brock & Blevins Co., 490 F.2d 563 (5th Cir.) (applying Georgia law, cert. denied, 419 U.S. 844 (1974)); Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353, 230 A.2d 769 (Ch. 1967); Bennett v. Breuil Petroleum Corp., 34 Del. Ch. 6, 99 A.2d 236 (Ch. 1953); cf. Matteson v. Ziebarth, 40 Wash. 2d 286, 242 P.2d 1025 (1952).

On the controlling stockholders' fiduciary relationship to the minority, see Pepper v. Litton, 308 U.S. 295 (1939); Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941), cert. denied, 316 U.S. 675 (1942); Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947).


The Comment to section 73 of the Model Act relates the fundamental change effected in the identity of the business entity by merger or consolidation to the sound reasons thought to underlie requiring more than a simple majority for shareholder approval. While the original Act required a two-thirds vote of approval, concern with the need to prevent a comparatively small minority from effectively thwarting the wishes of the majority led in 1969 to amending the Model Act to the present simple majority formula. Model Bus. Corp. Act. Ann. 2d § 73 ¶ 2 (1971). See also N.Y. Bus. Corp. § 903(a) (McKinney 1963) (requires two-thirds vote); Del. Code Ann. tit. 8, § 251(c) (1974) (majority vote).
proval and, as will be demonstrated, state appraisal rights have provided no guarantee that shareholders will receive a fair price. Furthermore, the most common going private device, a tender offer, requires neither shareholder approval nor appraisal rights.

For a minority stockholder forced out in a going private program, appraisal, even where available, is an inadequate remedy for at least two reasons. First, the opportunity for a true reevaluation of the stock's worth depends upon the absence of a market for the stock. Where an active market for the stock exists, courts tend to award the dissenters the market price on the grounds that it represents per se fair value. Appraisal is therefore likely to be an illusory remedy, because the very decision to go private is commonly motivated by the opportunity for a profitable corporate repurchase occasioned by a low market price. Where the most to be gained is the market value, no rational shareholder would seek through the courts a sum which he could have received through a market sale, without more expense than a broker's commission. Secondly, the delay, uncertainty and expense of pursuing the appraisal remedy will often dissuade the shareholder from seeking it, even in the rare situation where the statute might enable him to recover something more than the current market price.

19 For discussion of use of merger, asset sale, and dissolution to go private, see Borden at 989-99; Going Private at 909-11.
20 For a critical view of the notion that such statutes protect the minority, when in fact their more significant effect is to give "greater mobility of action to the majority—that is, to corporate managements speaking in the name of the majority," see Manning, supra note 1, at 226-30.
21 Going Private at 910.
22 Manning, supra note 1, at 231-32. Aside from the general threat of illiquidity posed by going private, the absence of a market may occur where, for example, public company A through merger becomes private company B; a hold-out stockholder in A, after completion of the going private transaction, holds an unmarketable equity.
24 For example, Concord Fabrics' public offerings in 1968 and 1969 resulted in the sale of 300,000 shares at $15 per share and 200,000 at $20 per share respectively. A going private merger and tender offer in February 1975 offered dissenters $3 per share, as against a then current market price of around $1. Marshel v. AFW Fabric Corp., [Current] CCH Fed. Sec. L. Rep. ¶ 95,219 (S.D.N.Y. June 25, 1975).
25 See Manning, supra note 1; Vorenberg, supra note 16.
26 For example, where a stockholder in corporation A dissents from a merger with corporation B, and his stock market price precipitously declines after announcement of the
That state corporation statutes and appraisal remedies are inadequate to protect minority shareholders in a going private transaction should be apparent: statutes requiring shareholder approval of corporate transactions provide no check upon the coercive aspects of a going private program, and appraisal is either unavailable or inadequate. State law in effect authorizes the majority to divest the minority of its interests, and generally leaves the dissenters without an assurance of receiving "fair consideration" for the shares subject to involuntary divestment.

Shareholder Challenges to Going Private: Federal Law

The policies underlying the federal role in securities transactions are the protection of investors and the protection of the integrity of the securities markets. In the service of these policies, the federal securities laws employ complementary disclosure requirements and antifraud regulations. The rationale behind the federal disclosure requirements is that investors will act in the interest of the national economy, and will require less direct protection, when they are provided with the information necessary to make reasoned financial decisions. It is therefore a matter of federal policy that investors be provided with adequate relevant information. However, existing disclosure requirements were formulated before the advent of the going private phenomenon, and they have failed to provide shareholders with sufficient information relevant to the decisions involved in those transactions.

merger, he is entitled to disregard the drop in market price for purposes of appraisal. Manning, supra note 1, at 231.

27 See Going Private at 913–22; Establishing Federal Standards at 649–58.


Dissenters seeking to enjoin the transaction, or to have the court review allegations of breach of fiduciary obligations owed the minority by the majority, often fail because appraisal is available to them. E.g., David J. Greene & Co. v. Schenley Indus., Inc., Del. Ch. ——, 281 A.2d 30 (Ch. 1971).


32 For discussion of disclosure provisions affecting going private transactions, see Borden at 1028–35.

33 It has been argued that "it would be best to adhere to established disclosure rules and to rely upon the shareholder's innate suspicion that things are going well if the in-
The federal securities regulations also provide for a concerted attack upon fraud in the securities markets. Section 10b of the 1934 Act and its implementing rule 10b-5 have been the foundation for much of the development in federal securities law. Tender offers are special cases proposed to go private," id. at 1029. But the concern should be with the shareholder's ability, not to discern how the company is faring, but rather to assess the adequacy of any price offered or contemplated to be paid for his equity. In that respect, the requirement proposed in rule 13e-3A, that the issuer disclose the price of shares sold in and aggregate proceeds of any public offerings within the last five years, at least gives the target shareholder a more meaningful basis upon which to calculate the adequacy of the offered price in a going private transaction. Rule 13e-3A(c)(1)(xvi), Appendix B.

34It shall be unlawful for any person, directly or indirectly . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance 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.


3517 C.F.R. § 240.10b-5 (1975):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, 

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.


specifically regulated by sections 14(d) and 14(e) of the Act, which impose disclosure requirements and an antifraud provision closely paralleling rule 10b-5. Nevertheless, shareholder attempts to characterize the terms of a going private tender offer as fraudulent under rule 10b-5 have proved only occasionally successful. The dissenting shareholders have found federal courts generally reluctant to look beyond the issue of compliance with the disclosure requirements. In the absence of specific regulation, federal courts have not, as a rule, been willing to review the propriety of the insiders’ actions.

As a result, the federal securities laws thus far have not afforded the shareholder a forum in which to object that going private will involuntarily deprive him of his ownership interest, operate as a fraud upon him by divesting him of that interest without adequate compensation, or disappoint his expectation that investment in a public company carries with it the benefits of both federal disclosure requirements and the more rigorous federal protection against insider trading and fraudulent practices. It is commonly considered a disturbing prospect that a public company, which engages in substantial interstate commerce, and has shares listed on the national exchanges, can force out minority interests in full compliance with existing federal and state law.

It is clear that the rules proposed by the SEC are intended to close the gap into which going private transactions seem to fall, a gap between the policies underlying the federal regulation of securities transactions and the conception of management-stockholder relationships as

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38 Id.
39 See cases cited note 5 supra.
42 Commissioner Sommer has suggested there be implied a promise on the part of companies going public that they will remain public. Sommer, supra note 4, at D–4. One court was willing to imply, based on a statement in the prospectus that the company would seek listing on the New York Stock Exchange, a promise that it would not voluntarily undertake any action that would lead to delisting unless pursuant to a proper corporate purpose. United Funds v. Carter Products, Inc., [1961–1964 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,288 (Baltimore Cir. Ct. 1963).
a matter for state corporation law. The proposed rules must be examined to determine the extent to which they would serve the federal poli-

One court interpreted the congressional intent in setting up the SEC to have been "to leave the states free to exercise such regulatory control over the sale of securities as does not conflict with the provisions of the Federal Act, and, in the absence of such a conflict, it is contemplated that the States and the Federal Government shall exercise concurrent jurisdiction in this field." Travelers Health Ass'n v. Commonwealth, 188 Va. 877, 897, 51 S.E.2d 263, 271 (1949), aff'd, 339 U.S. 643 (1950).

In McCrie v. Borne Chem. Co., 292 F.2d 824 (3d Cir.), cert. denied, 368 U.S. 939 (1961), the court said in often quoted dictum:

[The 1934] Act deals with the protection of investors, primarily stockholders. It creates many managerial duties and liabilities unknown to the common law. It expresses federal interest in management-stockholder relationships which theretofore had been almost exclusively the concern of the states. Section 10(b) imposes broad fiduciary duties on management vis-a-vis the corporation and its individual stockholders. As implemented by Rule 10(b)-5 and Section 29(b), Section 10(b) provides stockholders with a potent weapon for enforcement of many fiduciary duties. It can be said fairly that the Exchange Act constitutes far reaching federal substantive corporation law.

292 F.2d at 834.

To subject a going private transaction to scrutiny under existing federal law, a dissenter must make out a 10b-5 claim, which requires a disclosure violation. See, e.g., Popkin v. Bishop, 464 F.2d 714 (2d Cir. 1972). Where the dissenter cannot prevail on the 10b-5 ground, the federal court can administer any remedies arising under state law through exercise of pendent jurisdiction. See, e.g., Bryan v. Brock & Blevins Co., Inc., 490 F.2d 563 (5th Cir.), cert. denied, 419 U.S. 844 (1974) (trial court found a merger adopted solely to divest plaintiff of his investment at less than true value; affirming that the transaction violated Georgia law, the court declined to rule on the finding that it also violated plaintiff's rights under federal securities laws). In the absence of a 10b-5 claim, federal courts have no statute to apply. In denying a preliminary injunction in Kaufmann the court said:

The issue raised is undeniably serious and troublesome. The public has invested some $14 million in the company. The decision to buy out the public during the current depressed market will enable the public shares to be repossessed at a fraction of the original cost to the public shareholders.

This is really the basic issue and principle which plaintiff seeks to litigate.

Whether the offer is fair or unfair or a good or a bad transaction, however, does not raise a federal question.

386 F. Supp. at 16. The federal securities laws "in respect of their design and interpretive reach . . . are satisfied if a full and fair disclosure is made . . . ." Id. at 17.

cies, as well as whether the regulation of the purpose of the going private transaction is within the authority of the SEC.

**SUBSTANTIVE FAIRNESS REQUIREMENTS UNDER PROPOSED RULE 13E-3**

Given the inherently coercive nature of the tender offer device in going private, and the unwillingness of federal courts to deal with

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4 The proposed rules, in two alternative forms, deal with a “rule 13e-3 transaction”; with respect to matters common to both proposed forms, this 13e-3 designation is followed in the text. Where matters are found in only one, the two forms are designated 13e-3A and 13e-3B.

Proposed rule 13e-3A(a)(5):

(5) **Rule 13e-3 Transaction.** A “Rule 13e-3 transaction” is any transaction described in subsection (i) which, directly or indirectly, might have any of the effects or is part of a plan which might have any of the effects described in subparagraph (ii):

(i) **Types of Transactions:**

(A) a purchase of any equity security;

(B) a cash tender offer, an exchange offer, or any other tender offer for or request or invitation for tenders of any equity security; or

(C) a solicitation of any proxy, consent or authorization of a holder of any equity security in connection with any merger, consolidation or similar business combination transaction between an issuer (or its subsidiaries) and its affiliate; a sale of substantially all of the assets of an issuer to its affiliate; or a reverse split of any equity security involving the purchase of fractional shares.

(ii) **Effects of Transaction:**

(A) causing a class of equity securities to be subject to delisting from a national securities exchange;

(B) causing a class of equity securities to be eligible for termination of registration pursuant to Section 12(g)(4) of the Act;

(C) causing an issuer to be eligible for suspension of reporting obligations pursuant to Section 15(d) of the Act as at the beginning of the next fiscal year of the issuer; or

(D) causing a class of equity securities which is authorized to be quoted in an inter-dealer quotation system of a registered national securities association to cease to be so authorized.

Proposed rule 13e-3B(b):

(b) [The rule] shall apply to any transaction which has, or is intended to have, any of the following effects:

(1) compelling any security holder of the issuer to terminate his equity interest in the issuer;

(2) reducing, directly or indirectly, by 25 percent or more, the amount of any class of equity securities of the issuer outstanding prior to the transaction and held beneficially by persons other than the issuer and its affiliates;

(3) causing a class of equity securities of the issuer to be subject to delisting from a national securities exchange;

(4) causing a class of equity securities of the issuer to be eligible for termination of registration pursuant to Section 12(g)(4) of the Act;

(5) causing the issuer to be eligible for suspension of reporting obligations pursuant to Section 15(d) of the Act as at the beginning of the next fiscal year of the issuer; or

(6) causing a class of equity securities of the issuer which is authorized to be quoted in an inter-dealer quotation system of a registered national securities association to cease to be so authorized.

faireness issues under rule 10b-5, it must be concluded that disclosure requirements can be of only limited effectiveness in protecting minority shareholder interests in going private transactions. The proposed rules accordingly offer two alternative formulations which attempt to regulate substantive fairness in going private. Proposed Rules 13e-3A and 18e-3B require, respectively, fair price alone, or fair price and fair "terms," and a proper purpose in going private.

Rule 13e-3A apparently rejects any federal inquiry into the motive behind the transaction, in accordance with the view that divestment of ownership status, so long as fair compensation is paid, is but one of the many risks of investment and not a proper object of federal interest. Rule 13e-3A provides only that the offered consideration must "constitute fair value"—at a minimum, "fair value" as determined by two independent appraisers.

Rule 13e-3B, on the other hand, demands that the "terms of such transaction, including any consideration to be paid" be fair, and in addition attempts to protect shareholders from freezeout by requiring that the transaction be pursuant to a "valid business purpose." This note will first discuss the authority of the SEC to enact such a test through its rulemaking procedures, and will then examine the efficacy of such a standard.

**Limits on the Rulemaking Authority of the SEC: The "Valid Business Purpose" Test**

A threshold question with respect to Rule 13e-3B's "valid business purpose" requirement concerns the SEC's authority to promulgate such a provision. Section 13e of the 1934 Securities Exchange Act empowers the SEC to enact rules and regulations with respect to issuer share repurchases,

to define acts and practices which are fraudulent, deceptive, or manipulative, and... to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer

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46 See Going Private at 928–29.
47 Note 5 supra.
48 Rule 13e-3A(c)(2)(I).
49 Rule 13e-3B(a).
50 The notion of "vested shareholder rights," inviolate at common law, has given way to the need for corporate flexibility. Borden at 1020–21. See Establishing Federal Standards at 653–54.
51 Rule 13e-3A(c)(2).
52 Rule 13e-3B(a)(2).
53 Rule 13e-3B(a)(1).
to provide holders . . . with such information . . . as the Commission
deems necessary or appropriate.\textsuperscript{55}

An examination of the relevant legislative history indicates an intent on
the part of Congress to limit the SEC's rulemaking authority. Although
this section delegated authority to set disclosure requirements, it was
also intended to deny the Commission the power to regulate substan-
tive fairness.

Section 13e is a part of the 1968 Williams Act amendments to the
1934 Act.\textsuperscript{66} The original language of the bill as reported to the Senate
employed a disjunctive construction which implied the delegation of a
broad rulemaking power to the SEC:

\begin{itemize}
\item[(e)(1)] It shall be unlawful for an issuer, to purchase any equity se-
curity which it has issued in contravention of such rules and regula-
tions as the Commission may prescribe as necessary or appropriate
in the public interest or for the protection of investors or in order
\textit{to prevent such acts and practices as are fraudulent, deceptive, or
manipulative.}\textsuperscript{57}
\end{itemize}

This formulation met with the objection that its breadth would empower
the SEC to infringe upon the traditional state governance of questions
of fairness and conflicts of interest in issuer repurchases of shares.\textsuperscript{58}
These misgivings were confirmed in a prepared statement by then SEC
Chairman Manuel F. Cohen:

\begin{quote}
[\textit{E}ven where the management has no improper motive in repurchas-
ing securities, substantial repurchase programs will inevitably affect
market performance and price levels. That is why we believe that the
rule-making authority contained in the bills would be a valuable ad-
\end{quote}

\textsuperscript{55} Id.
\textsuperscript{58} See, e.g., letter from the Ass'n. of the Bar of the City of New York to the House
Comm. on Interstate and Foreign Commerce, June 28, 1968, in \textit{Hearings on S. 510 Before
the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign
Commerce, 90th Cong., 2d Sess.} (1968):

In our view, this proposal represents an unnecessary and unwarranted departure
from the concepts of investor protection which the Federal regulatory power has
been traditionally designed to provide . . . .

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

\textit{Id.} at 73–74.
GOING PRIVATE

junct to our authority under the existing antifraud provisions of the Act.

The provisions of the bills would make it unlawful for an issuer to purchase its own securities in contravention of rules or regulations which the Commission adopts ... irrespective of the question whether, or our ability to prove that, such activity is or may be fraudulent, deceptive, or manipulative.69

The House Subcommittee on Commerce and Finance responded by amending the bill and reporting it out in its present form:

(e) (1) It shall be unlawful for an issuer ... to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices.60

The Subcommittee report explained that the amendment was made to clarify the intent ... that the rules to be adopted by the Commission covering the purchase by an issuer of its own securities were related solely (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices.61

The amendment was explained further on the House floor by Representative Moss:

The original language might have been interpreted, although not so intended, as giving the Commission a broader basis for the prescription of rules unassociated with this purpose. The committee amendment makes it clear ... that the rules and regulations are to be designed to provide the information and procedures which the Commission feels are necessary in the public interest to provide means reasonably designed to prevent fraudulent, deceptive, or manipulative acts.62

69 Id. at 15 (emphasis added).
61 The ... amendment was made ... following consideration of the original language of the subsection which was in the disjunctive and lent itself to the possible although improbable interpretation that the Commission had authority to issue rules or regulations regarding the corporate purchase of its own securities in the public interest, or for the protection of investors, quite apart from whether designed solely to prevent acts and practices that are fraudulent, deceptive of [sic] manipulative. The revised language makes it clear that such rules and regulations may be adopted only for these purposes.

The House amended our bill to make this intent clear in language to the effect that rules and regulations to be adopted by the Securities and Exchange Commission covering the purchase of an issuer of its own securities were to be related
On its face, then, the language of section 13e might have supported an argument that going private without a "valid business purpose" was a fraudulent practice which the SEC might reach. But such a construction conflicts with the congressional intent to deny the SEC authority to regulate the purposes of corporate transactions, or in any other way prohibit transactions for broad policy reasons unrelated to "fraudulent, deceptive, or manipulative" practices.

Furthermore, apart from the stricture which the legislative history imposes upon the language of section 13e, it would be inconsistent with the statutory scheme in which that section operates to "define" as fraudulent any going private transaction which lacks a valid business purpose. The federal securities laws specifically provide for deregulation of companies and delisting of their shares from the national exchanges without regard to corporate purposes. It therefore seems unlikely that Congress intended, or would have approved, empowering the Commission to define fraudulent practices as a device for regulation of the management motive in going private. Rather, the conclusion must be that the SEC is not empowered to define a transaction as fraudulent if without a "valid business purpose."

solely to define acts and practices which are fraudulent, deceptive, or manipulative, and to prescribe means reasonably designed to prevent such acts and practices.

I believe that this distinction is extremely important, because the requirements that may be established under the bill include providing the holders of equity securities with information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information as the Commission deems necessary or appropriate.

This type of disclosure is obviously not necessary in the ordinary purchase of shares by a company for distribution under a stock option, employees' stock purchase, employees' saving, bonus, or incentive plan. Because such plans can be used in certain circumstances for manipulation or other purposes, it is important that the SEC set up definitions of which practices are considered improper and establish means to prevent those practices while not disrupting or adversely affecting legitimate purchases.

Id.


64 The clearest statement of the congressional purpose to limit the rulemaking authority of the Commission, so as to deny it the authority to prevent transactions on grounds unrelated to fraudulent practices, concerned the parts of the Williams Bill proposed to regulate tender offers. In this regard, Rep. Moss said: "It is not the purpose to prevent the making of any such offers, but solely the purpose of seeing that investors adequately are informed of the relative merits of their position before and after accepting such offer so that they can make a judgment properly required." Hearings, supra note 58, at 1.

65 A corporation can cease sending SEC-required proxy statements and annual reports to stockholders by reducing the total number of shareholders to below 300. 15 U.S.C. § 78f(g)(4) (1970).

66 Exchanges link delisting to a reduction in the stock's "float." See Going Private at 904 n.7.
Moreover, even if such a test were within the rulemaking authority of the Commission, the vagueness inherent in a "valid business purpose" requirement militates against its adoption. It is difficult to predict what the term "valid" will mean to either the SEC or the courts, and cases where state courts have examined the purpose behind transactions affecting control of the corporation, in order to rule on an alleged breach of fiduciary obligations, offer little guidance on the question. The vagueness of the test would necessarily impose costs which are unjustifiable unless one views as a great inequity the involuntary divestiture of a shareholder's ownership interest where adequate consideration is paid.

The most obvious cost of vagueness is the extensive litigation which will be required to define the meaning of the valid business purpose requirement. Since there is no reason to believe that federal courts would be more successful in this endeavor than state courts have been, such a cost seems unacceptable. Secondly, the vagueness of the test and the variety of results in analogous state cases would encourage strike suits, actions motivated primarily by the leverage for settlement which any uncertain standard engenders. Finally, uncertainty coupled with the accompanying potential for strike suits would have a deterrent effect upon management, discouraging attempts at going private even where such action is in the best interest of the corporation. On balance therefore, even apart from the issue of SEC authority, application of a valid busi-

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67 One commentator has argued that going private offers management the ultimate protection against a "raid," and that to the extent public policy tolerates freedom to raid, policy should also permit management defensive tactics. Therefore, going private as a defensive tactic by a profitable management of a going concern should be deemed "valid." Borden at 1014. Indications are that a narrower view of validity is contemplated, excluding purposes such as seeking deregulation. See Sommer, supra note 4, passim; cf. Chairman Cohen's remarks on repurchases to preserve control, Hearings, supra note 58, at 15. See generally, Kerr, Going Private: Adopting a Corporate Purpose Standard, 3 Sec. Reg. L.J. 33 (1975).


69 Some commentators have suggested that adequate consideration for a shareholder eliminated in a going private transaction must include that holder's pro rata share of the "benefits" going private engenders. Establishing Federal Standards at 652. But shareholders eliminated in mergers are systematically held not to be entitled to any comparable pro rata
ness purpose test to going private transactions seems ill-advised. It may be asked, however, whether a guarantee of fair dealing, as provided by other of the proposed rules, would satisfy the congressional directive and the policies of the federal securities laws.

Proposed Rule 13e-3 Fairness Requirements

Both formulations of the proposed rules require fairness in the going private transaction. Rule 13e-3B provides that the terms of the deal share in the synergistic benefits likely to accrue to the newly merged entity; to the extent involuntary divestiture serves a policy of corporate flexibility, no argument has been convincingly advanced to show why the treatment in going private situations should be any different. Even were there some plausible reason for prorating future benefits, the value of such unrealized benefits would prove virtually impossible to measure. The wiser course is to adhere to the fair price rule, and promulgate rules ensuring that shareholders being eliminated in a going private transaction receive a fair price for their pre-transaction interest.

70 Cf. Establishing Federal Standards at 674. But see id. at 657 n.97.
71 Proposed rule 13e-3A(b):

(b) Scope of the Rule. It shall be unlawful for any issuer, or any affiliate of such issuer at the commencement of a Rule 13e-3 transaction, to engage in a Rule 13e-3 transaction with respect to a class of equity securities of such issuer unless such issuer or affiliate complies with all of the conditions set forth in paragraph (c) of this rule.

Proposed rule 13e-3A(c)(2):

(2) The consideration for the equity securities to be purchased shall constitute fair value to the security holders of such class of the issuer who are not affiliates as determined in good faith by the issuer or its affiliate, and shall be no lower than that recommended jointly by two qualified independent persons. Such persons, in recommending the consideration, shall consider, among other factors, the value of the assets and earning power of the issuer. They shall each:

(i) after reasonable investigation, have reasonable grounds to believe, and believe, that their jointly recommended consideration constitutes fair value to the security holders of the issuer of such class who are not affiliates; and

(ii) submit to the issuer a written report and an opinion based thereon regarding the fairness of the recommended consideration to security holders of the issuer of such class who are not affiliates, setting forth the procedures followed, the basis for and the method of arriving at the recommended consideration, and any limitation imposed by the issuer or affiliate on the scope of the investigation; such report and opinion shall be available for inspection and copying by any interested equity security holder of the issuer at the executive offices of the issuer during its regular business hours.

Proposed rule 13e-3B(a):

(a) It shall be unlawful, as a fraudulent, deceptive or manipulative act or practice, for any issuer which has a class of equity securities registered under Section 12 of the Act or which files reports pursuant to Section 15(d) of the Act (the "issuer") or any person controlling, controlled by or under common control with the issuer (an "affiliate"), to enter into any transaction involving a purchase, directly or indirectly, of any equity security of the issuer which does have, or is intended to have, any of the effects described in subsection (b) hereof unless:

(1) if such transaction is entered into by the issuer, such issuer has a valid business purpose for doing so; and

(2) the terms of such transaction, including any consideration to be paid to any security holder, are fair.
and the consideration must be fair. While it is true that the need to curtail devious practices may counsel vesting discretionary powers in regulatory agencies, the open-ended requirement that the "terms" be fair calls for the exercise of an extremely broad discretion on the part of the SEC. For example, under such a test the SEC could decide that unfair "terms" included offering to exchange debenture securities for outstanding equity shares; arguably the decision to exchange the status of a shareholder for that of creditor rests, as a matter of federal securities policy, with the properly informed shareholder, not with the Commission. It is for this reason that the alternative proposal in Rule 13e-3A is preferable: although providing that the shareholder shall receive fair value for his interest, the 13e-3A rule goes far toward ensuring the efficacy of the fairness requirement by providing a method of valuation. Two independent appraisers are to determine a fair price for the shares in question, taking into account asset values and earning potential "among other factors," all of which must be disclosed in the appraisers' final report. They must also set forth the means by which they arrived at their valuation and stipulate the reasonable grounds for their opinion. The appraisers' joint report is to be available to any shareholder of the issuer.

Rule 13e-3A thus amounts to a federal provision for mandatory appraisal, providing for the protection of investors by ensuring a fair price. This version of the going private rules offers several advantages over state appraisal remedies: (a) the scheme would, through mandatory appraisal prior to the transaction, usually eliminate the delay and expense which are the inevitable costs of exercising appraisal rights under state statutes; (b) the scheme would provide, through its administration by the SEC, for a uniform system of valuation; (c) statutes or case law limiting dissenters to appraisal based upon current market price would be avoided; (d) a federal appraisal scheme would eliminate the anomaly of otherwise similarly situated shareholders receiving different treatment simply because they own shares in corporations incorporated in different states; (e) stockholders would have a federal cause of action to raise claims of abuse or manipulation of the appraisal process.

The legislative history discussed above indicates that the prevention of going private transactions is not a proper object of the rule-

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73 Proposed Rule 13e-3A(b), (c)(2), supra notes 9, 11.
74 See notes 22-28 supra & text accompanying.
75 The securities laws provide that district courts shall have jurisdiction over causes of action arising under the federal securities provisions. 15 U.S.C. §§ 77v, 78aa (1970).
76 See notes 53-63 supra & text accompanying.
making authority of the SEC. Congress has spoken to the issue of the appropriate scope of SEC rulemaking power in this area. Given the fact that the going private phenomenon has developed since the enactment of section 13,77 it is clear that the Rule 13e-3B “valid business purpose” test was not “intended” by Congress. In addition, the strong possibility that such a test would be unworkably vague in itself argues against its adoption. On the other hand, the Rule 13e-3A provision for an independent valuation is within the authority of the Commission. This version seems more practicable and its several advantages over state appraisal rights promise to alleviate the most serious inequity in going private transactions, unfairness of price. Rule 13e-3A therefore seems to provide the maximum degree of shareholder protection consistent with the limits of SEC authority, and the conflicting demands of other policies.

DISCLOSURE REQUIREMENTS UNDER THE PROPOSED RULES

Congress plainly did intend that the SEC assure the availability of adequate information to any shareholder faced with a tender offer or similar device for the reacquisition of shares. The proposed rules require any issuer or affiliate seeking to undertake a going private transaction to disclose to shareholders, in addition to information typical of disclosure requirements in other areas of federal securities regulation,78 certain facts particularly relevant to the decision confronting a shareholder in a going private situation. Among these are the likely effects of the transaction on the issuer; whether the officers, directors and affiliates will tender, sell, or vote their securities in favor of the transaction; the market performance of the securities for the previous two years; and, if the securities were offered to the public during the previous five years, the price per share and aggregate proceeds of the offerings. These facts are all relevant to an informed decision as to whether the price offered pursuant to the appraisers’ report is in fact fair value for the shareholder’s interest.79

The required disclosure of pertinent information promises to make the independent appraisers’ valuation report more meaningful, and together these provisions will help shareholders make a rational decision in those going private transactions where a meaningful choice is available. By requiring such disclosure and providing for the independent

77 Note 53 supra.
78 See note 30 supra; cf. 13e-3A(c)(1), APPENDIX B.
79 Such a demonstration of fair price is the objective of the independent appraisers’ joint report, required by 13e-3A(c)(2).
appraisal of the fair price of the interests affected by a going private transaction, the proposed rules would go far to alleviate the problems such transactions have engendered.

CONCLUSION

Going private transactions usually present conflicts between insider interests and the interests of shareholders facing take-out. Minority shareholders have encountered substantial difficulties in seeking fair compensation for their surrendered interests. Existing common and statutory law in the states has failed to provide adequate protection, and the unwillingness of the federal courts to look beyond compliance with disclosure requirements has effectively denied any alternative review of substantive fairness.

The SEC has proposed to ensure fair treatment for minority shareholders through the promulgation of one of two alternative fairness provisions, as well as disclosure requirements specifically tailored to the needs of shareholders facing a going private transaction. The Rule 13e-3B alternative, which requires a showing that the transaction is pursuant to a valid business purpose, is beyond the scope of the rulemaking authority delegated to the SEC by Congress. Moreover, even were this not so, the uncertainty and confusion which would accompany adoption of such a standard cannot be justified by concerns about the perceived inequity of involuntary divestment or the legitimate expectations of investors.

On the other hand, the Rule 13e-3A version, by requiring independent appraisal of shares, provides a workable scheme of protection from going private abuses. This alternative is within the rulemaking power of the Commission and seems to provide as much protection for investor expectations as is consistent with the demands of corporate flexibility and administrative practicality. Though this version would frustrate any unreasonable expectation that a public company must ever remain public, it would protect the more important expectation that a corporation will not divest shareholders of their interests for less than fair compensation. Such a scheme is reasonably designed to prevent abuses in going private transactions and would, unlike Rule 13e-3B, be consistent with the policies of the federal securities laws. It recognizes that investors in public companies expect to benefit from its public status; the shareholder expects to have access to corporate information and expects that the corporation's compliance with the applicable provisions of the federal securities laws will benefit him. An administrative rule en-
suring that investors receive fair value for interests affected by going private protects the most important of these expectations. The SEC can best protect investors without unduly hindering corporate flexibility by the adoption of Rule 13e-3A.

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APPENDIX A

13e-3A. (a) Definitions. For purposes of the rule, the following definitions shall apply:

(1) Affiliate. An "affiliate" of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with such issuer.

(2) Class of Equity Securities. The term "class of equity securities" shall include any security convertible or exchangeable into, or any warrant or right to subscribe to or purchase any security of such class.

(3) Executive Officer. The term "executive officer" means the president, secretary, treasurer, any vice president in charge of a principal business function (such as sales, administration or finance) and any other person who performs similar policy-making functions for the issuer.

(4) Purchase. A "purchase" means any acquisition for value or any contract to buy, purchase or acquire, including any "short form" merger and any purchase of fractional shares in connection with a reverse split.

(5) Rule 13e-3 Transaction. A "Rule 13e-3 transaction" is any transaction described in subsection (i) which, directly or indirectly, might have any of the effects or is part of a plan which might have any of the effects described in subparagraph (ii):

(i) Types of Transactions:
(A) a purchase of any equity security;
(B) a cash tender offer, an exchange offer, or any other tender offer for or request or invitation for tenders of any equity security; or
(C) a solicitation of any proxy, consent or authorization of a holder of any equity security in connection with any merger, consolidation or similar business combination transaction between an issuer (or its subsidiaries) and its affiliates; a sale of substantially all of the assets of an issuer to its affiliate; or a reverse split of any equity security involving the purchase of fractional shares.

(ii) Effects of Transaction:
(A) causing a class of equity securities to be subject to delisting from a national securities exchange;
(B) causing a class of equity securities to be eligible for termination of registration pursuant to Section 12(g)(4) of the Act;
(C) causing an issuer to be eligible for suspension of reporting obligations pursuant to Section 15(d) of the Act as at the beginning of the next fiscal year of the issuer; or
(D) causing a class of equity securities which is authorized to be quoted in an inter-dealer quotation system of a registered national securities association to cease to be so authorized.
(b) **Scope of the Rule.** It shall be unlawful for any issuer, or any affiliate of such issuer at the commencement of a Rule 13e-3 transaction, to engage in a Rule 13e-3 transaction with respect to a class of equity securities of such issuer unless such issuer or affiliate complies with all of the conditions set forth in paragraph (c) of this rule.

**NOTE:** A person who is not an affiliate of the issuer at the commencement of such person's tender offer for the equity securities of the issuer will not become an affiliate of that issuer for purposes of this rule prior to the termination of that tender offer.

(d) **Exceptions.** This rule shall not apply to:

(1) transactions by a holding company registered under the Public Utility Holding Company Act of 1935;

(2) transactions by an investment company registered under the Investment Company Act of 1940; or

(3) redemptions, calls or other similar purchases of an equity security by an issuer pursuant to specific provisions set forth in the instrument(s) creating or governing that class of equity securities.

Rule 13e-3B(b):

(b) Subsection (a) [note above] hereof shall apply to any transaction which has, or is intended to have, any of the following effects:

(1) compelling any security holder of the issuer to terminate his equity interest in the issuer;

(2) reducing, directly or indirectly, by 25 percent or more, the amount of any class of equity securities of the issuer outstanding prior to the transaction and held beneficially by persons other than the issuer and its affiliates;

(3) causing a class of equity securities of the issuer to be subject to delisting from a national securities exchange;

(4) causing a class of equity securities of the issuer to be eligible for termination of registration pursuant to Section 12(g)(4) of the Act;

(5) causing the issuer to be eligible for suspension of reporting obligations pursuant to Section 15(d) of the Act as at the beginning of the next fiscal year of the issuer; or

(6) causing a class of equity securities of the issuer which is authorized to be quoted in an inter-dealer quotation system of a registered national securities association to cease to be so authorized.

(c) Subsection (a) hereof shall not apply to:

(1) transactions between or among affiliates of the issuer not involving the issuer or any security holder of the issuer other than an affiliate;

(2) any transaction involving a purchase of a security for which specific provisions have been made in any instrument creating or governing that security;

(3) transactions by a holding company registered under the Public Utility Holding Company Act of 1935; or

(4) transactions by an investment company registered under the Investment Company Act of 1940.

**APPENDIX B**

13e-3A. (c) **Conditions to be Met.** A Rule 13e-3 transaction shall be unlawful unless all of the following conditions are met:

(1) The issuer or affiliate shall send the following information in accordance with the provisions of any applicable, federal, state or other law, but in no event later than 20 days prior to any purchase or any vote, consent or authorization, to each person who was a record holder as of a date not more than 30 days prior to the date of mailing and to each person known to such issuer or affiliate to have been as of such record date a beneficial owner of the class of equity securities subject to the Rule 13e-3 transaction:
(i) The title of the class of equity securities to which the transaction relates;

(ii) If the Rule 13e-3 transaction is to be effected by an affiliate, (A) the identity of the affiliate; (B) the identity of any executive officer, director or parent of the affiliate; (C) the principal business, occupation or employment of each person identified in (A) or (B) for the last 5 years, including the name and principal business of the organization with which such employment was carried on, and (D) the date(s), nature of conviction, name and location of court and penalty or other disposition of any conviction in a criminal proceeding (excluding traffic violations or similar misdemeanors) during the 5 years for each such person;

(iii) The source and amount of funds or other consideration to be used in making the purchases; and if any part of the purchase price or the proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained, describe the terms of the transaction and the identity of the parties thereto;

(iv) The purpose or purposes of the proposed transaction, including but not limited to any plans or proposals to liquidate the issuer, to sell its assets or merge it with any other person, or to make any other material change in its management, business or corporate structure;

(v) Any contracts, arrangements, or understandings involving the issuer or affiliate with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and describing the material provisions thereof;

(vi) The identity of all persons and classes of persons employed, retained or to be compensated by the issuer or affiliate or by any person on behalf of the issuer or affiliate to make solicitations or recommendations to security holders in connection with a Rule 13e-3 transaction and the terms of such employment, retainer or arrangement for compensation.

(vii) A description of the effect of the proposed transaction on the issuer, its affiliates and non-affiliated security holders of the class of equity securities, and a description of the terms or arrangements of the proposed transaction relating to any security holder which are not identical to those relating to other security holders;

(viii) An opinion of counsel respecting the legality of the transaction under the law of the state or other jurisdiction under the laws of which the issuer was organized;

(ix) A statement of the intentions of executive officers, directors and affiliates of the person effecting the Rule 13e-3 transaction as to whether they will or will not tender or sell or vote securities of the issuer owned or held by them or vote securities with respect to which they hold proxies and the reasons therefor;

(x) The two years audited financial statements required to be filed with the issuer's most recent annual report under Sections 13 and 15(d) of the Act, together with a balance sheet as of the last day of the most recent period subsequent to the end of the last fiscal year for which a quarterly report was required to be filed pursuant to the Act, and statements of income, retained earnings and changes in financial position for the period then ended and for the corresponding period of the preceding fiscal year;

(xi) Pro forma data showing the effect of the proposed transaction on (A) the issuer's most recent balance sheet furnished pursuant to (x) above; (B) the issuer's statement of income for the last fiscal year or the 12-month period prior to the date of the balance sheet referred to in (A) above; (C) book value per share as of the date of the balance sheet referred to in (A) above; and (D) the ratio of earnings to fixed charges for the period referred to in (B) above;

(xii) The frequency and amount of any dividends with respect to such class of equity securities during the last two years, any restrictions on the issuer's ability to pay dividends and any plan or intention to declare a dividend or to alter the dividend policy of the issuer in the future;
(xiii) The amount of the issuer's equity securities beneficially owned as of the most recent practicable date by any executive officer, director or affiliate of the issuer, or any pension, profit sharing or similar plan of the issuer or affiliate; the aggregate amount of the issuer's equity securities purchased directly or indirectly during the preceding two years, if any, and the aggregate dollar amounts paid for such securities by the issuer, any executive officer, director or affiliate and any pension or profit sharing or similar plan of the issuer or affiliate; and the number of securities purchased and the price per share paid during the last 60 days by each such person.

(xiv) A general description of the federal tax consequences of the proposed transaction to the issuer and its security holders;

(xv) If there is an established market for such class of equity securities, the high and low sale prices of such securities (or in the case of trading in the over-the-counter market, or in the absence of trading on an exchange during a particular period, the range of representative high and low bid and asked quotations) for each quarterly period within the past two years and the nature of the market and source of the quotations. If the securities are traded on one or more exchanges, the name of the principal exchange should be given. If there is no established trading market excluding limited or sporadic quotations, it should be so stated;

(xvi) The offering price per share, subject to appropriate adjustments, the aggregate proceeds received by the issuer and the proceeds received by each affiliate of the issuer, if securities of the class were offered to the public by the issuer or affiliates during the five years preceding the date of the proposed transaction;

(xvii) A fair and adequate summary of the reports, opinions and the joint recommendation required by subparagraph (c)(2); the method of selection of the persons giving such recommendation and opinions, any material relationship between such person or its affiliates and the issuer or its affiliates which then exists or is mutually understood to be contemplated or which has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship;

(xviii) A reasonably itemized statement of all expenses incurred or estimated to be incurred in connection with a proposed Rule 13e-3 transaction, including but not limited to filing fees, legal, accounting and appraisal fees, solicitation expenses, and printing costs.

(xix) A fair and adequate summary of any appraisal obtained by or for the issuer or its affiliate regarding the issuer, its material assets, or securities within the last two years.

(xx) Such additional material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not materially misleading.

(c)(3) If an issuer or affiliate engages in a Rule 13e-3 transaction involving a cash tender offer, an exchange offer or any other tender offer for or request or invitation for tenders of any equity security:

(i) the issuer or affiliate shall file with the Commission eight copies of any written offer or request or invitation for tenders which shall contain the information required by subparagraph (c)(1) and any additional solicitation material at the time any copies of the offer or request or invitation for tenders are first sent to holders of the equity securities, but in no event later than 20 days prior to any purchase pursuant to such offer, request or invitation;

(ii) if any material change occurs in the information filed pursuant to subsection (c)(4)(i), eight copies of an amendment shall promptly be filed with the Commission to reflect such change;

(iii) securities deposited pursuant to a tender offer subject to this subparagraph may be withdrawn by or on behalf of a tendering security holder at any time prior to the acceptance for purchase of such securities by the issuer or affiliate;

(iv) if more securities are deposited during the twenty days between the day on which the offer is first sent to security holders and the first day on which securities may be accepted for purchase than the issuer or affiliate is bound or willing to
accept for purchase, any securities accepted for purchase shall be accepted on a pro rata basis as nearly as is practicable disregarding fractional shares;

(v) if the consideration offered to security holders in a tender offer subject to this subparagraph is increased, the increased consideration shall be paid for all securities accepted for purchase in the Rule 13e-3 transaction regardless of whether such securities were accepted prior to the increase in consideration;

(vi) any purchase by the issuer or affiliate within sixty days subsequent to the expiration of a tender offer subject to this subparagraph shall be deemed to be made pursuant to such tender offer;

(vii) If the consummation of such a transaction results in one of the effects described in subdivision (a)(5)(ii)(B) or (C) of this rule, or results in the effect described in subdivision (a)(5)(ii)(A) of this rule and the issuer is not subject to Section 12 or 15(d) of the Act, the issuer or its affiliate within 30 days after such consummation must:

A. notify any remaining holder of equity securities of that class regarding the result and effect of the transaction; and

B. offer to purchase the securities held by each remaining security holder for the same consideration paid in the Rule 13e-3 transaction for a period of at least 20 days following the day the notice required by this subparagraph is sent to each remaining security holder.