

4-1-1990

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Daniel L. Goelzer

Susan Nash

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## Recommended Citation

Daniel L. Goelzer and Susan Nash, *Expanding Disclosure in Control Transactions: The Proposed Significant Equity Participant Regulations and the Co-Bidder Cases*, 1 U. Miami Bus. L. Rev. 1 (2014)

Available at: <http://repository.law.miami.edu/umblr/vol1/iss1/2>

# BUSINESS LAW JOURNAL

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VOLUME 1

SPRING 1990

NUMBER 1

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## **Expanding Disclosure in Control Transactions: The Proposed Significant Equity Participant Regulations and The Co-Bidder Cases**

DANIEL L. GOELZER\* AND SUSAN NASH\*\*

### INTRODUCTION

The Securities and Exchange Commission recently published for comment proposals (Proposed Rules) that would require increased disclosure concerning significant equity participants in limited partnerships, closely-held corporations, and similar entities engaged in control transactions.<sup>1</sup> In the release accompanying the Proposed Rules, the Commission described the prevalence of closely-held entities as a source of financing in control transactions. The Commission noted that limited partnerships were used as a source of financing in approximately 27% of the hostile tender offers commenced in fiscal year 1988, and that, in some cases, the acquiring person was a newly formed entity, with no operations and with the sole purpose of acquiring control of the target com-

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\* General Counsel, Securities and Exchange Commission.

\*\* Attorney, Securities and Exchange Commission.

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1. 54 Fed. Reg. 10,360 (1989) (to be codified at 17 C.F.R. pt. 240) (proposed March 13, 1989). Throughout this Article, the term "control transactions" refers to four types of transactions: major acquisitions of securities, tender offers, proxy contests, and going private transactions.

pany. Likewise, the Commission observed that closely-held entities have played similar roles in proxy contests, for example, in the proxy contest for Gillette Co., Inc., conducted by The Coniston Group where the identity of, and control exercised by, limited partners was a central issue in litigation between the parties. The Commission noted that even after The Coniston Group amended its disclosure to identify the limited partners of the filing persons, the disclosure merely revealed another level of limited partnerships and that no information was provided about the limited partners, other than that capital contributions provided a source of funds for the acquisition of securities.<sup>2</sup> In describing the need for disclosure with respect to significant equity participants in limited partnerships, closely-held corporations, and similar entities, the Commission explained that, under current rules, disclosure of information about significant equity participants, although it may be material to shareholders and the market, may not be required.<sup>3</sup>

The issuance of the Proposed Rules is not the only response that has been made to concerns about the sufficiency of disclosure

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2. *Id.* at 10,362. See also *Gillette Co. v. RB Partners*, 693 F. Supp. 1266 (D. Mass. 1988) (whether advertisement placed by Gillette purporting to reveal participants in The Coniston Group was false or misleading). Cf. Rich and Klarish, *Expanding Disclosure of Partnership Interests in Control Transactions*, 3 *INSIGHTS* 23 (1989) (Information regarding the equity participants in a takeover has sometimes been sought as a source of information regarding possible defenses to the takeover. Such defenses have included public relations campaigns exposing the unsavory nature, confidential financial information, or foreign background of the participants, as well as allegations of violations of the margin rules, the Investment Company Act of 1940 (15 U.S.C. §§ 80a-1-80a-64 (1988)), or applicable industry regulations.).

3. 54 Fed. Reg., *supra* note 1, at 10,362. Even the identity of limited partners may not be publicly available, since many state statutes governing limited partnerships do not require the inclusion of limited partners' identities in the certificate of limited partnership filed with the state. See, e.g., DEL. CODE ANN. tit. 6, § 17-201(a) (Supp. 1988); D.C. CODE ANN. § 41-421(a) (Supp. 1989); MD. CORPS. & ASS'NS CODE ANN. § 10-201(a) (Supp. 1989).

The increased use of partnerships as acquisition vehicles has caused difficulties in the antitrust area as well as the securities area. Under section 7A of the Clayton Act, 15 U.S.C. § 18a (1988), persons contemplating certain acquisitions of assets or voting securities are required to provide advance notice to the Federal Trade Commission and the Department of Justice. In a recent advance notice of proposed rulemaking, the Federal Trade Commission noted its concern with, and sought comment with respect to, the existence of non-reportable transactions that may raise antitrust concerns, particularly where partnerships are used as the acquisition vehicle. 54 Fed. Reg. 7,960 (1989) (February 24, 1989).

about participants in control transactions. In recent years, tender offer targets have argued that persons with various roles in tender offers are "co-bidders" with respect to the tender offers and, accordingly, subject to the securities law disclosure requirements that apply to tender offerors. Thus, a significant body of case law has developed, articulating when a tender offer participant is a co-bidder subject to such disclosure requirements.<sup>4</sup> The forms of participation in tender offers considered by the cases have included participation as a shareholder of a privately-held acquiring corporation and as a lender where loan fees were tied to the results of the tender offer. Several recent cases involved a determination of the co-bidder status of an investment bank that played multiple roles (such as advisor, underwriter, equity partner, and financier) in a tender offer.

This Article will outline the present statutory and regulatory structure with respect to disclosure required by and about participants in control transactions. It will then examine two principal mechanisms that have recently been developed to ensure that material disclosure is provided concerning participants playing varied roles in control transactions: the Proposed Rules and the co-bidder cases.

## I. PRESENT STATUTORY AND REGULATORY STRUCTURE

The purpose of disclosure requirements applicable to control transactions is to provide full and fair disclosure for the benefit of

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4. See *MAI Basic Four, Inc. v. Prime Computer, Inc.*, 871 F.2d 212 (1st Cir. 1989); *City Capital Associates Ltd. Partnership v. Interco Inc.*, 860 F.2d 60 (3d Cir. 1988); *Prudent Real Estate Trust v. Johncamp Realty, Inc.*, 599 F.2d 1140 (2d Cir. 1979); *Arkansas Best Corp. v. Pearlman*, 688 F. Supp. 976 (D. Del. 1988); *Polaroid Corp. v. Disney*, 862 F.2d 987 (3d Cir. 1988); *Koppers Co. v. American Express Co.*, 689 F. Supp. 1371 (W.D. Pa. 1988); *Macfadden Holdings, Inc. v. John Blair & Co.*, Civ. No. 86-161 MMS (D. Del. May 16, 1986); *Warnaco, Inc. v. Galef*, Civ. No. B-86-146 (PCD) (D. Conn. April 3, 1986) (LEXIS, Genfed library, Dist file), *aff'd mem.*, 800 F.2d 1129 (2d Cir. 1986); *Van Dusen Air, Inc. v. APL Ltd. Partnership*, Civ. No. 4-85-1256 (D. Minn. Sept. 20, 1985); *Revlon, Inc. v. Pantry Pride, Inc.*, 621 F. Supp. 804 (D. Del. 1985); *Pabst Brewing Co. v. Kalmanovitz*, 551 F. Supp. 882 (D. Del. 1982), *aff'd mem. sub nom. Jacobs v. Pabst Brewing Co.*, 707 F.2d 1392 (3d Cir. 1982); *Gray Drug Stores, Inc. v. Simmons*, 522 F. Supp. 961 (N.D. Ohio 1981); *Riggs Nat'l Bank v. Allbritton*, 516 F. Supp. 164 (D.D.C. 1981).

investors.<sup>5</sup> The disclosure requirements applicable to four types of control transactions — major acquisitions of securities,<sup>6</sup> tender offers,<sup>7</sup> proxy contests,<sup>8</sup> and going private transactions<sup>9</sup> — are described below.

Any person who, after acquiring the beneficial ownership of any equity security of a class registered under section 12 of the Securities Exchange Act of 1934 (Exchange Act) (or certain other specified equity securities), is the beneficial owner of more than 5% of the class is required to make certain disclosures within ten days after the acquisition.<sup>10</sup> The Commission has prescribed<sup>11</sup> that such disclosures are to be made on a Schedule 13D.<sup>12</sup>

Likewise, it is unlawful to make a tender offer for any class of any equity security which is registered pursuant to section 12 of the Exchange Act (or certain other specified equity securities) if, after consummation thereof, the offeror would be the beneficial owner of more than 5% of the class, unless certain disclosures are made at the time copies of the offer are first published or sent or given to security holders.<sup>13</sup> The Commission has prescribed<sup>14</sup> that such dis-

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5. See, e.g., 54 Fed. Reg., *supra* note 1, at 10,361 (disclosure requirements designed to publicize material facts concerning nature of transaction and participants so security holders have opportunity to make informed investment decisions); S. REP. NO. 550, 90th Cong., 1st Sess. 3 and H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2813 (“[The Williams Act] is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.”). See also Securities Act Release No. 6022, Exchange Act Release No. 15548, Investment Company Act Release No. 10575, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,935, at 81,207 (Feb. 5, 1979) (“In the context of tender offers, the Commission is empowered to require full and fair disclosure for the benefit of investors and to permit both the [bidder] and the management of the [target] an equal opportunity to fairly present their positions.”); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 28-31 (1977); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58-59 (1975); *Sonesta Int’l Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 249 (2d Cir. 1973); *Bolton v. Gramlich*, 540 F. Supp. 822, 836 (S.D.N.Y. 1982).

6. 15 U.S.C. § 78m(d) (1988).

7. 15 U.S.C. § 78n(d) (1988).

8. 15 U.S.C. § 78n(a) (1988).

9. 15 U.S.C. § 78m(e) (1988).

10. 15 U.S.C. § 78m(d)(1) (1988).

11. 17 C.F.R. § 240.13d-1(a) (1989).

12. 17 C.F.R. § 240.13d-101 (1989).

13. 15 U.S.C. § 78n(d)(1) (1988).

14. 17 C.F.R. § 240.14d-3(a) (1989).

closures are to be made by "bidders" on Schedule 14D-1.<sup>15</sup> For this purpose, the Commission has defined a "bidder" generally as "any person who makes a tender offer or on whose behalf a tender offer is made."<sup>16</sup>

In the case of proxy contests, it is unlawful to solicit a proxy for any security (other than an exempted security) registered pursuant to section 12 of the Exchange Act if the solicitation contravenes the Commission's rules and regulations.<sup>17</sup> The Commission has prescribed<sup>18</sup> that, in the case of a person other than the issuer, no proxy solicitation may be made unless the person has filed the information specified by Schedule 14B.<sup>19</sup>

In the case of going private transactions, it is unlawful for an issuer (or any person controlling, controlled by, or under common control with the issuer) which has a class of equity securities registered pursuant to section 12 of the Exchange Act (or which is a closed-end investment company registered under the Investment Company Act of 1940)<sup>20</sup> to purchase any equity security issued by it if the purchase contravenes rules and regulations adopted by the Commission (i) to define acts and practices which are fraudulent, deceptive, or manipulative and (ii) to prescribe means reasonably designed to prevent such acts and practices.<sup>21</sup> The Commission has prescribed<sup>22</sup> that, in connection with a going private transaction, the issuer (or any person controlling, controlled by, or under common control with the issuer) is required to file Schedule 13E-3.<sup>23</sup>

Each of Schedules 13D, 14D-1, 14B, and 13E-3 provides for disclosure by the filing person with respect to itself. The information to be provided generally includes the identity and background of the filing person, the purpose of the transaction, plans or propos-

15. 17 C.F.R. § 240.14d-100 (1989).

16. 17 C.F.R. § 240.14d-1(b)(1) (1989). *Cf.* 12 C.F.R. § 11.601(b)(1) (1989) (Under regulations issued by Comptroller of the Currency applicable to tender offers for bank securities, "bidder" has the meaning outlined in the text.).

17. 15 U.S.C. § 78n(a) (1988).

18. 17 C.F.R. § 240.14a-11(c)(1) (1989).

19. 17 C.F.R. § 240.14a-102 (1989).

20. 15 U.S.C. §§ 80a-1-80a-64 (1988).

21. 15 U.S.C. § 78m(e) (1988).

22. 17 C.F.R. § 240.13e-3(a)(1) & (d) (1989).

23. 17 C.F.R. § 240.13e-100 (1989).

als for the issuer, the source and amount of funds for the transaction, and any borrowing for the transaction. In addition, each Schedule requires more limited disclosure by the filing person with respect to certain other persons. General Instruction C of Schedule 13D is representative:

If the statement is filed by a general or limited partnership, syndicate, or other group, the information called for by Items 2-6, inclusive, shall be given with respect to (i) each partner of such general partnership; (ii) each partner who is denominated as a general partner or who functions as a general partner of such limited partnership; (iii) each member of such syndicate or group; and (iv) each person controlling such partner or member. If the statement is filed by a corporation or if a person referred to in (i), (ii), (iii) or (iv) of this Instruction is a corporation, the information called for by the above mentioned items shall be given with respect to (a) each executive officer and director of such corporation; (b) each person controlling such corporation; and (c) each executive officer and director of any corporation or other person ultimately in control of such corporation.<sup>24</sup>

The language of General Instruction C of Schedules 14D-1<sup>25</sup> and 13E-3<sup>26</sup> is identical to the foregoing Instruction in relevant respects, and similar language is found in Instruction 2 of Schedule 14B.<sup>27</sup> Pursuant to these instructions, if the filing person is a limited partnership, the filing person must provide specified information with respect to each partner who is denominated as a general partner or who functions as a general partner of such limited partnership,<sup>28</sup> and if the filing person is a corporation, the filing person

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24. 17 C.F.R. § 240.13d-101 (1989).

25. 17 C.F.R. § 240.14d-100 (1989).

26. 17 C.F.R. § 240.13e-100 (1989).

27. 17 C.F.R. § 240.14a-102 (1989).

28. See Securities Act Release No. 5844, Exchange Act Release No. 13787, Investment Company Act Release No. 9862 [1977-78 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,256, at 88,375 (July 21, 1977) (no disclosure required with respect to limited partners who do not act or have the power to act in a manner substantially equivalent to general partners). Instruction 2 of Schedule B provides: "If the [filing person] is a partnership, corporation, association or other business entity, the information called for by Item 2, 3 and 4(b) and (c) shall be given with respect to each partner, officer and director of such entity, and each person controlling such entity, who is not a participant." 17 C.F.R. § 240.14a-102 (1989). By its terms, Instruction 2 does not distinguish between limited and general partners of a limited partnership. However, Instruction 2 has been construed

must provide specified information with respect to each person controlling such corporation. The specified information generally relates to identity, background, funding, and purposes.<sup>29</sup> Under current General Instructions C of Schedules 13D, 14D-1, and 13E-3 and Instruction 2 of Schedule 14B, disclosure ordinarily is not required with respect to a person who holds an equity interest in a filing person, including a limited partner of a filing person that is a limited partnership, unless the person has control (express or *de facto*) over the filing person.

Nonetheless, in certain circumstances, the present statutory and regulatory structure requires disclosure in control transactions with respect to persons other than the filing person and persons specified in General Instructions C of Schedules 13D, 14D-1, and 13E-3 and Instruction 2 of Schedule 14B. Thus, as the Commission indicated in the release issued in connection with the Proposed Rules, "[t]he identification of significant equity participants and certain additional information currently may be required under circumstances pursuant to specific items of the schedules."<sup>30</sup>

This rationale has been applied by the Third Circuit in *CNW Corp. v. Japonica Partners, L.P.*<sup>31</sup> In that case, Japonica Partners, L.P., acted as the general partner of a number of limited partnerships formed for the purpose of acquiring common stock of CNW Corporation. The Third Circuit held that Item 3(e) of Schedule 14B<sup>32</sup> required Japonica to disclose the contents of the limited partnership agreements and the identities of the limited partners. In its discussion, the Third Circuit analyzed the relationship between

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consistently with Instructions C of Schedules 13D, 14D-1, and 13E-3. 54 Fed. Reg., *supra* note 1, at 10,362. See also Rich and Klarish, *supra* note 2, at 24 ("[A]s a practical matter, [14B] filers generally do not furnish information relating to most limited partners.").

29. See 17 C.F.R. § 240.13d-101 (1989) (Items 2 through 6); 17 C.F.R. § 14d-100 (1989) (Items 2 through 7); 17 C.F.R. § 240.13e-100 (1989) (Items 2, 3, 5, 6, 10, and 11); 17 C.F.R. § 240.14a-102 (1989) (Items 2, 3, and 4(b) and (c)).

30. 54 Fed. Reg., *supra* note 1, at 10,363 n.24 (citing as examples Items 6 and 7 of Schedule 13D and Items 7 and 11 of Schedule 14D-1).

31. 874 F.2d 193 (3d Cir. 1989).

32. Item 3(e) requires the filing person to state whether or not it is, or was "within the past year, a party to any contract, arrangements or understandings with any person with respect to any securities of the registrant" and, if so, to "name the parties to such contracts, arrangements or understandings and give the details thereof." 17 C.F.R. § 240.14a-102 (1989).



specific items of Schedules 13D and 14B, on the one hand, and Instructions C and 2 thereof, on the other:

Instructions C and 2 of those schedules stipulate the entities and persons, in addition to the filer, *with respect to whom* the information required by each item must be supplied when the filer is not a natural person. Their effect is to *expand* the information required to be disclosed by increasing the number of entities and persons with respect to whom the filer must supply a name, the amount of securities of the registrant held, the details of contracts with respect to such securities to which such entity or person is a party, and other information. Contrary to Japonica's argument, the effect of these instructions is not to *restrict* the information that the filer must supply *with respect to itself*.<sup>33</sup>

## II. PROPOSED RULES

The Proposed Rules, which are intended to provide shareholders with material information concerning significant equity participants in limited partnerships, closely-held corporations, and similar entities engaged in control transactions, reflect the Commission's concern that the current instructions to Schedules 13D, 14D-1, 14B, and 13E-3 may not adequately provide shareholders and the marketplace with material information about significant participants in control transactions.<sup>34</sup> The current instructions to Schedules 13D, 14D-1, 14B, and 13E-3 require disclosure about the acquiring entity and persons acting in an express or *de facto* control relationship with the acquiring entity. Absent such a control relationship, disclosure generally is not required with respect to persons who contribute significant capital to, or are entitled to receive

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33. 874 F.2d at 200. *But see*, HUBCO, Inc. v. Rappaport, 628 F. Supp. 345, 357-58 (D.N.J. 1985) (Instruction C of Schedule 13D, "requiring information only from the general partner in a limited partnership, controls over the more general instruction in Item 3."). Item 3 provides that "if any part of the purchase price is or will be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, trading or voting the securities," the filing person is required to provide "a description of the transaction and the names of the parties thereto." 17 C.F.R. § 240.13d-101 (1989). The release accompanying the Proposed Rules indicates that, to the extent that HUBCO suggests that Instruction C does not require disclosure of limited partners even if control is demonstrated, the Commission disagrees and proposes to revise the instruction to make this clear. 54 Fed. Reg., *supra* note 1, at 10,364 n.26.

34. 54 Fed. Reg., *supra* note 1, at 10,360-61.

a significant interest in the profits or assets of, the acquiring entity.<sup>35</sup> In the release accompanying the Proposed Rules, the Commission noted that, notwithstanding the absence of a control relationship, information about significant equity participants may be material to shareholders and the marketplace for at least three reasons.

First, the agreement to provide a significant equity contribution to a transaction, without more, in many instances may provide a form of implicit control or potential influence. Second, upon liquidation or dissolution of the filing person, equity participants could become beneficial owners of a significant block of the acquired entity's stock. Third, information concerning an equity participant may be particularly material where the equity participant also participates in the transaction in another capacity because, absent full disclosure of the entire interest of the equity participant, shareholders may be misled as to the nature of the equity participant's interest in the transaction.<sup>36</sup> The Proposed Rules are intended to assure (i) that material information about significant equity participants would be disclosed and (ii) that persons whose equity participation in the acquiring entity could provide influence over management (which influence may be difficult to prove) would be identified.<sup>37</sup> In this regard, the Commission would intend that the revised instructions to Schedules 13D, 14D-1, 14B, and 13E-3 be interpreted to require disclosure if information about a significant participant in a control transaction would otherwise be omitted.<sup>38</sup>

The Proposed Rules would amend the instructions to Schedules 13D, 14D-1, 14B, and 13E-3 to require that responses be provided to specified items of the Schedules relating to the identity, background, funding, and purposes of the filing person with respect to each person who (i) contributes more than 10% of the equity capital of the filing person or (ii) has a right to receive in the aggregate, directly or indirectly, more than 10% of the profits, or upon

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35. 54 Fed. Reg., *supra* note 1, at 10,362.

36. 54 Fed. Reg., *supra* note 1, at 10,362.

37. 54 Fed. Reg., *supra* note 1, at 10,362.

38. 54 Fed. Reg., *supra* note 1, at 10,363.

liquidation 10% of the assets, of the filing person.<sup>39</sup> Such information would be required whether or not the significant equity participant would be deemed a controlling person of the filing person.<sup>40</sup> The capital contribution test is intended to prevent evasion of the disclosure requirements by using special allocations to avoid a 10% interest in profits or assets.<sup>41</sup>

If a Schedule is filed by multiple persons acting as a group,<sup>42</sup> the 10% standard would apply at the group level, *i.e.*, disclosure would be required with respect to persons who contribute more than 10% of the equity capital of the group or have a right to receive more than 10% of the profits or assets of the group and not with respect to persons who merely contribute more than 10% of the equity capital of a member of the group or have a right to receive more than 10% of the profits or assets of a member of the group.<sup>43</sup> Application of the 10% standard at the group level is intended to limit the number of equity participants covered by the disclosure requirements.<sup>44</sup> The new disclosure requirements with respect to significant equity participants would not apply where the filing person has a class of equity securities registered under section 12 of the Exchange Act because information concerning such equity participants is already required to be disclosed under the bene-

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39. The following addition to General Instruction C of Schedule 13D is representative:

If the person filing the statement is other than a natural person and does not have a class of equity securities registered under Section 12 of the [Exchange] Act, or if the statement is filed by a group that includes such entities, in addition to the information required above, information for Items 2-6, inclusive, shall be provided for each person who contributes more than 10 percent of the equity capital, or has a right to receive in the aggregate, directly or indirectly, more than 10 percent of the profits, or upon dissolution or liquidation, 10 percent of the assets of that person or group. Such disclosure shall be required notwithstanding the absence of a control relationship.

54 Fed. Reg., *supra* note 1, at 10,365.

40. 54 Fed. Reg., *supra* note 1, at 10,363. The Proposed Rules would also clarify that Instructions C of Schedules 13D, 14D-1, and 13E-3 and Instruction 2 of Schedule 14B apply to persons who control limited partnerships or other non-corporate entities. 54 Fed. Reg., *supra* note 1, at 10,363. *See supra* note 33.

41. 54 Fed. Reg., *supra* note 1, at 10,363.

42. *See* Exchange Act §§ 13(d)(3) & 14(d)(2), 15 U.S.C. §§ 78m(d)(3) & 78n(d)(2) (1988) ("When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for the purpose of this subsection.").

43. 54 Fed. Reg., *supra* note 1, at 10,363.

44. 54 Fed. Reg., *supra* note 1, at 10,363.

ficial ownership reporting requirements of sections 13(d)<sup>45</sup> and 13(g)<sup>46</sup> of the Exchange Act and in periodic reports and proxy materials of the issuer.<sup>47</sup>

The Proposed Rules would not impose reporting requirements on additional persons or amend the items of disclosure to broaden the disclosure required. Instead, the Proposed Rules would increase the information required to be provided by the filing person by requiring information regarding certain equity participants to be provided by the filing person.<sup>48</sup> The Proposed Rules would not, by their terms, require the disclosure of financial information of a significant equity participant. Current law would be unchanged in this regard. That is, if the interest and control exercised by an equity participant were sufficient to make it a bidder,<sup>49</sup> financial information, if material, would be required.<sup>50</sup>

In its request for comments on the Proposed Rules, the Commission noted a number of specific areas with respect to which it sought comment, including whether 10% was the appropriate level of equity participation at which disclosure should be required; whether the new disclosure requirement should apply only to a specified number of the filing person's largest equity participants who meet the threshold level of participation; whether additional criteria should be considered in imposing a disclosure obligation, such as whether the acquiring entity was formed generally for acquisition purposes or solely for the acquisition of a single issuer; and whether the proposals would benefit shareholders and the marketplace and would be subject to evasion.<sup>51</sup> The comment period for the Proposed Rules closed on May 12, 1989.<sup>52</sup> The staff of the Commission will review the comments received before proposing

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45. 15 U.S.C. § 78m(d) (1988).

46. 15 U.S.C. § 78m(g) (1988).

47. 54 Fed. Reg., *supra* note 1, at 10,363.

48. 54 Fed. Reg., *supra* note 1, at 10,363. Of course, certain information with respect to such equity participants presently may be required pursuant to specific items of the Schedules. See *supra* notes 30-33 and accompanying text.

49. See *infra* notes 54-105 and accompanying text.

50. 54 Fed. Reg., *supra* note 1, at 10,364.

51. 54 Fed. Reg., *supra* note 1, at 10,363.

52. 54 Fed. Reg., *supra* note 1, at 10,361.

further action with respect to the Proposed Rules.<sup>53</sup>

### III. CO-BIDDER CASES

As discussed above,<sup>54</sup> the requirement to file a Schedule 14D-1 in connection with a tender offer is imposed by regulation on "bidders," *i.e.*, the persons who make the tender offer or on whose behalf the tender offer is made. The Commission has stated that the term "bidder" was intended to provide a short-hand reference to a principal participant in a tender offer and avoid certain pejorative terms commonly used to describe participants in tender offers.<sup>55</sup>

#### A. Description of Co-Bidder Cases

A recent series of cases has addressed the issue of when a person is a co-bidder with the acquiring entity. In these cases, the courts were faced with the necessity of making determinations of co-bidder status based on the particular facts presented. The co-bidder cases generally have involved a challenge by the target of a tender offer to the acquiring entity's disclosure on the ground that some third person was a co-bidder with the acquiring entity and was required to provide the information required by Schedule 14D-1, particularly the financial information which may be required by Item 9 of Schedule 14D-1.<sup>56</sup>

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53. Goelzer, Quinn, and Walter, *Recent Developments in Tender Offer Regulation* 66, 21st ANN. INST. ON SEC. REG. (1989).

54. *See supra* notes 14-16 and accompanying text.

55. Securities Act Release No. 6022, Exchange Act Release No. 15548, Investment Company Act Release No. 10575 [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,935, at 81,216 (Feb. 5, 1979).

56. *See, e.g.*, *City Capital Associates Ltd. Partnership v. Interco Inc.*, 860 F.2d 60 (3d Cir. 1988); *Arkansas Best Corp. v. Pearlman*, 688 F. Supp. 976 (D. Del. 1988); *Koppers Co. v. American Express Co.*, 689 F. Supp. 1371 (W.D. Pa. 1988). Item 9 of Schedule 14D-1 provides:

Where the bidder is other than a natural person and the bidder's financial condition is material to a decision by a security holder of the subject company whether to sell, tender or hold securities being sought in the tender offer, furnish current, adequate financial information concerning the bidder; *Provided*, That if the bidder is controlled by another entity which is not a natural person and has been formed for the purpose of making the tender offer, furnish current, adequate financial information concerning such parent.

17 C.F.R. § 240.14d-100 (1989). Because Item 9 does not require financial statements from all bidders, a finding of co-bidder status alone is not sufficient to impose an obligation to disclose financial statements under Item 9. Accordingly, the co-bidder cases discuss not

The earliest co-bidder cases, *Prudent Real Estate Trust v. Johnncamp Realty, Inc.*,<sup>57</sup> *Riggs National Bank v. Allbritton*,<sup>58</sup> and *Gray Drug Stores, Inc. v. Simmons*,<sup>59</sup> involved a variety of fact patterns. In *Prudent Real Estate Trust*, the Second Circuit determined that a tender offer for shares of a real estate investment trust should be enjoined pending disclosure pursuant to Item 9 of Schedule 14D-1 of financial information about a corporate shareholder of the acquiring corporation (and certain persons related to the shareholder), where the shareholder owned 40% of the common shares of the acquiring corporation; had agreed to provide 20% of the equity required for the offer in the form of a preferred stock investment in the acquiring corporation; would have exclusive control of the voting of acquired target shares and, generally, management of property received in respect of such shares; and would be retained by the acquiring entity as an independent contractor responsible for supervising implementation of decisions of the parties with respect to the management and operation of the acquiring entity.

*Prudent Real Estate Trust* is not strictly speaking a co-bidder case because the court apparently proceeded on the assumption that the shareholder's status was such that financial information about the shareholder, if material, was required to be disclosed under Item 9 and focused its analysis on the materiality issue, concluding that the financial information was material. Nonetheless, the opinion is a forerunner of the co-bidder cases because the court considered the same kinds of factors used by other courts to determine co-bidder status. As factors weighing against the need for disclosure, the court noted that the shareholder with respect to whom disclosure was sought was supplying only 20% of the financing and that the financial information of the 80% party to the transaction (which was disclosed) showed it to be a company of substance. As factors weighing in favor of disclosure, the court noted that the shareholder with respect to whom disclosure was

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only whether co-bidder status is present, but also whether the financial information of a co-bidder is required to be disclosed under Item 9. The second issue, however, is beyond the scope of this Article and will not be discussed herein.

57. 599 F.2d 1140 (2d Cir. 1979).

58. 516 F. Supp. 164 (D.D.C. 1981).

59. 522 F. Supp. 961 (N.D. Ohio 1981).

sought had the right to vote all acquired target shares and certain management rights with respect to the target shares.<sup>60</sup>

A target's contention that certain corporate affiliates of an individual bidder were co-bidders was rejected by the United States District Court for the District of Columbia in *Riggs*.<sup>61</sup> The court based its finding that the individual was the sole bidder on (i) clear and convincing evidence that the debt to be incurred for the purchase of the tendered shares was to be assumed solely and personally by the individual, (ii) evidence that during the individual's discussions and negotiations regarding the tender offer, the focus was on him as sole purchaser, and (iii) the absence of any credible evidence from which the court could find that the individual was acting in conjunction with his affiliates with respect to the tender offer.<sup>62</sup>

The tender offeror in *Gray Drug* was National City Lines, Inc. (NCL). Approximately 92% of the outstanding common stock of NCL was owned by Contran Corporation (Contran), and approximately 99% of Contran's outstanding common stock was owned by Contran Holding Company (Contran Holding), which in turn was wholly owned by a trust established by Harold C. Simmons for the benefit of his children and grandchild, of which Simmons was the sole trustee. Simmons was chairman of the board of Contran Holding, president and a director of Contran, and chairman of the board and chief executive officer of NCL.

The United States District Court for the Northern District of Ohio, relying on the *Riggs* decision, concluded that "[a]bsent an affirmative showing . . . that NCL is acting in conjunction with its affiliates with respect to this particular tender offer . . . NCL alone is the principal participant making the Offer and is the sole 'bidder' . . ."<sup>63</sup> In rejecting the argument that Simmons, the trust, Contran

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60. 599 F.2d at 1147.

61. The target in this case was a national banking association, and the disclosure requirements were therefore administered by the Comptroller of the Currency. Exchange Act section 12(i), 15 U.S.C. § 78l(i) (1988). Pursuant to rules in effect at the time of the *Riggs* case, the term "bidder" was defined by the Comptroller in the same manner as by the Commission, *i.e.*, as "any person who makes a tender offer or on whose behalf a tender offer is made." 516 F. Supp. at 171.

62. 516 F. Supp. at 171.

63. 522 F. Supp. at 967.

Holding, and Contran were co-bidders, the court found that NCL's ability to transfer its rights to purchase tendered shares to its affiliates was not sufficient, standing alone, to lead to the conclusion that NCL's affiliates were co-bidders.<sup>64</sup> The court relied, in part, on evidence that showed that NCL was the sole purchasing entity, that NCL was to pay for all shares tendered, and that NCL had adequate cash reserves to do so.<sup>65</sup>

Several of the co-bidder cases, *Pabst Brewing Co. v. Kalmanovitz*,<sup>66</sup> *Arkansas Best Corp. v. Pearlman*,<sup>67</sup> and *Warnaco, Inc. v. Galef*,<sup>68</sup> involved acquiring entities that were formed specifically for the purpose of making a tender offer. In *Pabst*, the target argued that the individuals who owned 50% and 24.5%, respectively, of the stock of the corporation that owned 100% of the corporate tender offeror were the real bidders in the offer. The United States District Court for the District of Delaware did not expressly consider whether the individuals were, in fact, bidders, and, instead, focused on whether financial information regarding them was material.<sup>69</sup> However, in discussing the materiality issue, the court considered the role of the individuals in the tender offer, and concluded that the individuals should have disclosed some financial information about themselves because they were the primary motivating force behind the formation and capitalization of the tender offeror for the sole purpose of effecting a tender offer by using their personal finances. The court further found that the individuals were the dominant and motivating principals behind the tender offer because they personally invested substantial capital to capitalize the tender offer.<sup>70</sup>

The United States District Court for the District of Delaware found that certain individuals were co-bidders with the acquiring entity in *Arkansas Best*. Relying on *Pabst*, the court based its con-

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64. *Id.*

65. *Id.*

66. 551 F. Supp. 882 (D. Del. 1982), *aff'd mem. sub nom. Jacobs v. Pabst Brewing Co.*, 707 F.2d 1392 (3d Cir. 1982).

67. 688 F. Supp. 976 (D. Del. 1988).

68. Civ. No. B-86-146 (PCD) (D. Conn. April 3, 1986) (LEXIS, Genfed library, Dist file), *aff'd mem.*, 800 F.2d 1129 (2d Cir. 1986).

69. 551 F. Supp. at 889-94.

70. *Id.* at 892-93.



clusion on the facts that a series of corporations and partnerships were formed specifically to make the tender offer, that the individuals controlled the acquisition entities and were the primary motivating force behind the tender offer, that the individuals contributed \$37,000,000 of the \$280,000,000 needed for the tender offer, and that their controlled corporations would contribute target shares worth \$14,431,813.50 before consummation of the tender offer. Accordingly, the court found that the individuals were bidders as they were the "dominant and motivating principals" behind the tender offer.<sup>71</sup>

*Warnaco* involved the question of whether four individuals were co-bidders where they contributed \$6,000,000 to form the acquiring corporation, which held no assets other than the foregoing funds, engaged in no business, and was formed as a legal mechanism for effecting the tender offer. The United States District Court for the District of Connecticut found that the individuals were not co-bidders because the offer was in the name of the corporation, which was not acting for the individuals. The court expressly found that the facts that the corporation had no purpose other than to effect the tender offer and serve as a holding company until merged with the target did not alter this result. The court further found that the individuals' potential to dominate and control the corporation did not make them co-bidders, noting that the individuals had no binding agreement to vote their shares or other ties. Finally, the court found that the fact that the acquiring corporation itself was newly formed for the purpose of the acquisition and had no elaborate financial data to disclose did not change the result.<sup>72</sup>

Two of the co-bidder cases, *Revlon, Inc. v. Pantry Pride, Inc.*<sup>73</sup> and *Van Dusen Air, Inc. v. APL Limited Partnership*,<sup>74</sup> concerned the issue of whether a lender of funds for a tender offer was a co-bidder. In *Revlon*, the United States District Court for the District of Delaware concluded that a loan to be made by Chemical Bank in

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71. 688 F. Supp. at 981.

72. *Warnaco, Inc. v. Galef*, slip op. at 14-15.

73. 621 F. Supp. 804 (D. Del. 1985).

74. Civ. No. 4-85-1256 (D. Minn. Sept. 20, 1985).

connection with a tender offer rendered Chemical Bank a commercial lender and not a co-bidder. Specifically, the court found that Chemical Bank's perfected security interest in the target stock (which could not be acted upon prior to a loan default and, even then, was limited to recovery of the amount of the loan) did not make it a co-bidder where the tender offeror was the sole purchasing entity and the tender offeror's parent assumed all responsibility for repayment of the Chemical Bank loan.<sup>75</sup>

The *Revlon* court also concluded that certain persons who indirectly owned interests in the tender offeror were not bidders because they did not capitalize the tender offeror with their funds and there was no evidence that they offered their funds to the tender offeror to assist in the offer. Noting that the decisions in *Prudent Real Estate Trust*, *Riggs*, and *Pabst* all rested on whether the defendant participated financially in the tender offer, the court concluded that a majority shareholder position with respect to a tender offeror's parent, without evidence of financial participation in the tender offer, is insufficient to constitute bidder status.<sup>76</sup>

In *Van Dusen*, the target argued that the loan's structure, which tied loan fees to the results of the tender offer,<sup>77</sup> made the lender a co-bidder. The court noted, however, that the lender had no right to influence the tender offer, could not instruct the offeror to accept or reject tendered shares, and had no power to control the offeror's use of its existing target shares.<sup>78</sup> Citing what the court referred to as the Commission's focus on bidders as "principal participants,"<sup>79</sup> the court concluded that, "in the mind of the SEC, the distinction between bidders and the rest of humanity is not subtle,

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75. 621 F. Supp. at 816-17.

76. *Id.* at 813-14.

77. Specifically, the lender was to receive a \$150,000 commitment fee and, if the committed funds were drawn down, a \$150,000 closing fee. If the tender offeror did not purchase additional shares under its tender offer, but instead sold its existing shares prior to drawing down loan funds, the lender would receive 10% of the tender offeror's profit on the sale, less reasonable expenses of conducting the offer and the \$150,000 commitment fee. If, after receiving the first loan advance, but before drawing down the full loan amount, the tender offeror sold previously owned or tendered shares, the lender would receive 10% of the offeror's profit up to a maximum of \$400,000, with credit given for the commitment and closing fees. *Van Dusen Air, Inc. v. APL Ltd. Partnership*, slip op. at 3.

78. *Id.*

79. *See supra* note 55 and accompanying text.

but rather is used to make a simple differentiation between those who are central to the offer and those who are not."<sup>80</sup> The court also noted the focus of *Gray Drug* "on the practical connection between the offeror and its affiliates with respect to the tender offer" and the conclusion of the *Revlon* court that Chemical Bank was not a bidder.<sup>81</sup> The *Van Dusen* court applied the foregoing to conclude that the lender was not a co-bidder because it was not a principal participant in the tender offer in light of the facts that its activity consisted of supplying money and collecting a fee therefor and that it received no right to purchase or control any of the target's shares, except for the right arising out of its security interest in the event of a default.<sup>82</sup>

Three recent co-bidder cases, *Koppers Co. v. American Express Co.*,<sup>83</sup> *City Capital Associates Limited Partnership v. Interco Inc.*,<sup>84</sup> and *MAI Basic Four, Inc. v. Prime Computer, Inc.*,<sup>85</sup> involved a determination of the co-bidder status of an investment bank that played multiple roles in a tender offer. In *Koppers*, the United States District Court for the Western District of Pennsylvania found that the multiple roles of Shearson Lehman Brothers Holdings, Inc., and its affiliates (the Shearson Interests) were likely to render the Shearson Interests co-bidders in a tender offer. The Shearson Interests were owners of approximately 46% of the common stock of the acquiring entity (although entitled to less than 46% of the voting rights) and acted as financial adviser for the acquiring entity and as a dealer-manager for the tender offer. The Shearson Interests also were to provide approximately \$570 million of the approximately \$1.7 billion needed to complete the tender offer.<sup>86</sup> In addition to their equity interests in the tender offer, the

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80. *Van Dusen Air, Inc. v. APL Ltd. Partnership*, slip op. at 4.

81. *Id.* at 5.

82. *Id.* at 5-6.

83. 689 F. Supp. 1371 (W.D. Pa. 1988).

84. 860 F.2d 60 (3d Cir. 1988).

85. 871 F.2d 212 (1st Cir. 1989).

86. This financing was to be provided by the Shearson Interests to the acquiring entity in one of two forms, to be determined at the discretion of the acquiring entity. Shearson Holdings would either (i) contribute \$570 million in return for unsecured senior subordinated notes (Notes) from the acquiring entity or (ii) contribute \$540 million in return for Series B Preferred Stock of the acquiring entity and make an additional \$30 million loan. Shearson Holdings was given the right to exchange the Series B Preferred

Shearson Interests were to earn significant brokerage fees by (i) underwriting the purchase of target stock and (ii) potentially underwriting up to \$570 million in securities to refinance the contribution of the Shearson Interests, in which case the Shearson Interests would be entitled to a fee of \$2.5 million.

In finding a high probability that the target would successfully establish at trial that the Shearson Interests were co-bidders, the court noted the Shearson Interests' multiple roles as advisor, underwriter, equity partner, and financier. The court noted the central participatory role of the Shearson Interests and stated that it "would find it difficult to conclude that as a matter of law, one of the principal planners and players in [the tender offer] is exempt from the disclosure requirements of the Williams Act solely because it would hold slightly less than a 50% interest in the tender offeror after the purchase."<sup>87</sup>

In *Interco*, the Third Circuit considered whether the participation of Drexel Burnham Lambert, Inc., in a tender offer was sufficient to make Drexel a co-bidder. In that case, Drexel was engaged to raise \$1.375 billion (of the \$2.6 billion in financing required) for the tender offer through the sale of preferred securities of the acquiring entity. Between 29% and 36% of the common equity of the acquiring entity was to be made available to Drexel or its designees. Drexel sought the right to place the common equity as a "sweetener" to encourage prospective purchasers to purchase the preferred securities. Drexel had the right to keep for itself up to half of the 36% of common equity. However, Drexel was under no obligation to purchase any equity interest in the acquiring entity.

Drexel was entitled to a \$12 million fee if the tender offer was successful and a \$6 million fee otherwise. In addition, Drexel was to receive a 1.125% fee for funds for which it secured written commitments and 3% to 5.25% of the total gross proceeds from the sale of debt or equity securities underwritten by Drexel. Drexel was also to receive a \$2 million fee for rendering financial advisory

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Stock for Notes upon the merger of the acquiring entity and the target. If the Note option was used, the acquiring entity would issue, and the Shearson Interests would underwrite, up to \$570 million of senior subordinated debentures to refinance the Notes. 689 F. Supp. at 1386.

87. *Id.* at 1390.

services and a \$1 million fee for acting as dealer-manager. Finally, Drexel was entitled to 15% of the profits made by certain individuals involved in the takeover if acquired shares were sold following an unsuccessful takeover.

The Third Circuit found that the substantial fees to be received by Drexel for services rendered were irrelevant to co-bidder status and that Drexel's right, for itself and its designees, to purchase between 29% and 36% of the common equity of the acquiring entity was insufficient to confer co-bidder status.<sup>88</sup> The court noted that there was no indication that Drexel was to have any control over the tender offer or any role with respect to the acquiring entity other than as an investor, and distinguished *Koppers* on the ground that the Shearson Interests in that case were entitled to board representation.<sup>89</sup> The court viewed the issue before it as whether a person who would hold a minority investment position in the entity surviving a tender offer is a co-bidder,<sup>90</sup> and concluded, based on its reading of the current tender offer regulations, that such a person is not a co-bidder.<sup>91</sup>

The dissent in *Interco* found that Drexel was a co-bidder. In so doing, the dissent rejected the majority's distinction of *Koppers* on the basis of board representation, concluding that the relevant test for co-bidder status is beneficial ownership of stock.<sup>92</sup> The dissent found that Congress "intended that disclosure be made by those expansively designated persons or groups obtaining the benefit of securities ownership through a variety of arrangements,"<sup>93</sup> and did not intend to limit disclosure only to an entity or individual that "dominates" or "controls" the group making a tender offer.<sup>94</sup> Thus, the dissent rejected the majority's conclusion that the holder of a minority investment in the entity surviving a tender offer was not a co-bidder.

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88. 860 F.2d at 63.

89. *Id.* at 63.

90. *Id.* at 63-64.

91. *Id.* at 64-65. The decision in *Interco* was followed in *Polaroid Corp. v. Disney*, 862 F.2d 987, 991 n.2 (3d Cir. 1988), *aff'g in relevant part*, *Polaroid Corp. v. Disney*, 689 F. Supp. 1169 (D. Del. 1988).

92. 860 F.2d at 68.

93. *Id.* at 67.

94. *Id.* at 68.

Like *Interco*, *Prime Computer* involved the question of whether Drexel was a co-bidder. Unlike the Third Circuit in *Interco*, the First Circuit concluded that Drexel was a co-bidder in *Prime Computer*. In reaching its conclusion, the First Circuit compared the facts before it to both the *Koppers* and *Interco* cases. In likening the case before it to *Koppers*, the court noted that Drexel had equity interests in various affiliates associated with one of the principal stockholders of the acquiring entities (LeBow) and a background of association with the acquiring entities and other LeBow interests, participated very early in the planning of the tender offer, had (until after the commencement of the tender offer) a director with veto power in the corporation that owned the general partner of the sole equity participant in the bidder group, was instrumental in raising the \$20 million of equity for the tender offer, and would enjoy substantial fees (perhaps in excess of \$65 million) for its role in the tender offer. The court also noted, however, that Drexel's projected equity position was far less than Shearson's 46% interest in *Koppers*.<sup>95</sup>

The court found that Drexel's role in *Prime Computer* was distinguishable from its role in *Interco* because of Drexel's early and pervasive role in the planning and execution of the *Prime Computer* offer, its board representation in the corporation controlling the sole equity participant in the bidder group, and evidence sufficient reasonably to suggest an expectation that Drexel would itself provide additional financing for the offer if it could not place \$875 million in junk bonds.<sup>96</sup>

However, in concluding that Drexel was a co-bidder, the First Circuit did not rely on factual distinctions from *Interco*, but instead rejected what it characterized as the Third Circuit's "bright-line" position that an entity that would be a minority stockholder after a tender offer is not a bidder. The court adopted what it viewed as the "more flexible, fact-based approach" of the *Interco* dissent.<sup>97</sup> The First Circuit stated:

we cannot say that, as a matter of law, an active advisor-broker-

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95. 871 F.2d at 219.

96. *Id.* at 219.

97. *Id.* at 219.

financier-participant who owns less than a majority interest in the surviving entity is not a bidder where, as here, there has been a history of close association, equity sharing, board representation and involvement from the beginning of the present offer, and where there is the possibility of the advisor-broker being the indispensable key to the offer's success. Nor can we say that while a 46 percent stockholder qualifies as a bidder, a 14 percent direct stockholder with other indirect equity interests cannot qualify.<sup>98</sup>

Co-bidder issues were also raised in *Macfadden Holdings, Inc. v. John Blair & Co.*<sup>99</sup> In that case, the United States District Court for the District of Delaware determined that co-bidder status did not apply to a privately-held corporation (Trafalgar) which was committed to purchase \$25 million in exchangeable preferred stock<sup>100</sup> in the merged entity created by a tender offer if sufficient shares were tendered to enable the merger to go forward. The exchangeable preferred stock, representing all the preferred stock in the merged entity, had detachable warrants entitling Trafalgar, for a period up to ten years, to purchase 19.9% of the common stock of the merged entity for \$6,000,000.

The court based its determination that co-bidder status did not apply on the facts that (i) after the tender offer, Trafalgar would not own any equity stock and, in fact, Trafalgar structured its role in the tender offer to avoid an equity position for the foreseeable

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98. *Id.* at 221. The First Circuit relied on "group" analysis to conclude that Drexel was a co-bidder:

We read the "on whose behalf" language of Rule 14d-1(b)(1) to incorporate the "group" concept of sections 13(d) and 14(d) of the Williams Act. . . .

Our interpretation of bidder under Rule 14d-1(b)(1) is consistent with the statute. Section 14(d) of the [Exchange Act] by explicit cross-reference incorporates the scope of the disclosure requirements of [section 13(d) of the Exchange Act]. . . . The legislative history of the latter section contradicts an exclusive focus on control . . . .

. . . . At a minimum it is evident that Drexel has "act[ed] as a partnership, limited partnership, . . . or other group for the purpose of acquiring, holding, or disposing of securities of an issuer."

*Id.* at 220-21. See *supra* note 42.

99. Civ. No. 86-161 MMS (D. Del. May 16, 1986).

100. The stock was redeemable at the option of the acquiring entity after five years and was exchangeable at the option of the acquiring entity into high-yield securities after three years. *Macfadden Holdings, Inc. v. John Blair & Co.*, slip op. at 16 n. 12.

future; (ii) Trafalgar had not been involved actively in the takeover plans; and (iii) Trafalgar would have no involvement in the management of the merged company and had not discussed proposed management with the principal participants in the acquisition.<sup>101</sup> The court found that this result was not altered by the fact that Trafalgar might exercise its option to purchase up to 19.9% of the common stock of the merged entity because there was no evidence of an intent to exercise the warrants immediately after the merger and, indeed, little incentive to do so as the intent of those controlling the tender offer was to make the merged entity a private company and exercise of the warrants would therefore give Trafalgar the undesirable position of a minority shareholder in a private company.<sup>102</sup> Nor was Trafalgar's equity contribution to the acquiring entity sufficient to make Trafalgar a co-bidder since its \$25 million commitment was only 8% of the total financing required and, including the \$6 million Trafalgar might pay for common stock, Trafalgar's contribution was still less than 10% of the total financing, a percentage which the court noted was far less than the 20% which the *Prudent Real Estate Trust* court found only marginally significant.<sup>103</sup>

### B. Recurrent Themes in Co-Bidder Cases

The co-bidder cases do not form a highly-structured and coherent body of authority. The determinations of co-bidder status in these cases are highly fact-specific, and, even where similar facts might have led to similar results, this has not always occurred. Nonetheless, certain recurrent themes appear in the co-bidder cases.

The courts that have addressed the co-bidder issue appear to have considered financial responsibility for a tender offer to be highly indicative of co-bidder status. Thus, courts have held that an individual who was solely responsible for the debt incurred to purchase tendered shares was a sole bidder (*Riggs*); that the entity actually paying for tendered shares was the sole bidder where it had

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101. *Id.* at 16-19.

102. *Id.* at 17.

103. *Id.* at 19.



adequate cash reserves to make such payment (*Gray Drug*); and that a lender was not a co-bidder where the tender offeror was the sole purchasing entity and the tender offeror's parent assumed responsibility for repayment of the lender's loan (*Revlon*). However, where financial responsibility for a tender offer is shared, there is no clear guidance as to the level of participation that will render a person a co-bidder. On the one hand, it has been held that the provision of 8-10% of financing did not make the provider a co-bidder (*Macfadden*), that the provision of only 20% of financing is a factor weighing against the need for disclosure (*Prudent Real Estate Trust*), and that a minority investment position in an acquiring entity is not sufficient to make a person a co-bidder (*Interco*). On the other hand, it has been held that a majority interest in the acquiring entity is not critical to co-bidder status (*Koppers, Prime Computer*).

Where an acquiring entity was formed and capitalized solely as a vehicle for a tender offer, courts have found that the persons who formed and capitalized the acquiring entity were "the dominant and motivating principals" and "the primary motivating force" behind the tender offer and, accordingly, were co-bidders (*Pabst, Arkansas Best*). Likewise, where a majority shareholder of a tender offeror's parent did not capitalize the tender offeror, the shareholder was not a co-bidder (*Revlon*) and control of the acquiring entity in excess of 90% did not confer co-bidder status where the acquiring entity had sufficient cash reserves to pay for the tendered shares (*Gray Drug*). Nevertheless, at least one court has found that individuals were not bidders where they formed and capitalized an acquiring corporation as a legal mechanism for effecting a tender offer (*Warnaco*).

Courts have considered a person's involvement in, and power to control, a tender offer as indicative of co-bidder status. Thus, a principal planner and player in a tender offer was held to be a co-bidder (*Koppers*), as was a party that was involved from the beginning of a tender offer and that might prove to be an indispensable key to the offer's success (*Prime Computer*). By contrast, parties with no control over tender offers (*Van Dusen, Interco*) and an entity contributing funds for a tender offer, but not actively involved

in the tender offer plans, (*Macfadden*) were held not to be bidders. The courts have considered post-tender offer control, like control of the tender offer itself, to be indicative of bidder status (*Prudent Real Estate Trust, Macfadden*).

Courts have sometimes found that a person's assumption of multiple roles with respect to a tender offer is indicative of bidder status (*Koppers, Prime Computer*), but this criterion is not always determinative and, in fact, certain aspects of a person's participation in a tender offer may be deemed irrelevant to co-bidder status (fees for services rendered found irrelevant to co-bidder status in *Interco*). While multiple roles may be indicative of co-bidder status, certain very limited roles, e.g., as lender, may indicate that co-bidder status is not present (*Revlon, Van Dusen*).

Finally, in determining co-bidder status, courts have also focused on whether the alleged co-bidders acted in conjunction with the acquiring entity (*Riggs, Gray Drug*).

Although the Commission was not a party to any of the co-bidder cases and has not itself addressed the issue of what constitutes co-bidder status,<sup>104</sup> members of the Commission staff have identified a number of factors that may be relevant to such an analysis:

In determining whether to raise a co-bidder comment in connection with a review of a Schedule 14D-1, the staff will consider whether the person or entity will "purchase" the tendered securities directly or indirectly through a controlled entity, or otherwise acquire an economic interest in the target. The person also must have the ability significantly to direct the offer. Not all situations where there is a wholly- or majority-owned bidder will call for a co-bidder analysis. The focus should be on whether co-bidder status is necessary to obtain material information that otherwise is not called for under Instruction C to the Schedule. See *City Capital Assoc. Limited Partnership v. Interco, Inc.*, 860 F.2d 60 (3d Cir. 1988).

Other factors the staff will evaluate in determining whether a person is a co-bidder include:

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104. See, e.g., *Koppers Co. v. American Express Co.*, 689 F. Supp. 1413, 1415 (W.D. Pa. 1988) (express statement on Commission's behalf that Commission would not address correctness of court's co-bidder ruling).

- (i) The extent to which the person is acting in conjunction with the named bidder;
- (ii) The extent to which the person is providing equity or debt financing for the tender offer;
- (iii) The extent to which a person, directly or indirectly, controls the named bidder;
- (iv) The extent to which the person would be deemed to own beneficially the securities purchased by the bidder pursuant to the offer or the assets of the target company following completion of the offer; and
- (v) The extent to which the person controls the terms of the tender offer.<sup>105</sup>

### CONCLUSION

In recent years, participation in control transactions has taken many forms. As a result, in order to ensure that shareholders and the market continue to receive material information regarding such transactions, the application of securities law disclosure requirements is evolving to fit these varied forms of participation. The two mechanisms described in this Article are aspects of this evolution.

Recently, the Commission published the Proposed Rules concerning significant equity participants. The Proposed Rules would require that certain fundamental information be provided with respect to participants in control transactions, *i.e.*, major acquisitions of securities, tender offers, proxy contests, and going private transactions, that have a specified level of equity participation. Thus, the Proposed Rules would ensure that certain basic disclosure is provided with respect to persons whose participation in control contests exceeds an objectively determined level.

Co-bidder analysis, and, in particular, the co-bidder cases, have applied a somewhat different approach in the context of tender offers. Under this analysis, co-bidder status is determined based on all the relevant facts and circumstances. Once co-bidder status is established, a co-bidder is a filing person and is required to

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105. Goelzer, Quinn, and Walter, *supra* note 53, at 84-85.

provide all disclosure required of a tender offeror, including, where material, financial information.

As noted in the Commission release accompanying the Proposed Rules,<sup>106</sup> co-bidder analysis would be unaffected by the adoption of the Proposed Rules. Hence, the Proposed Rules, if adopted, would supplement co-bidder analysis in the case of tender offers and would also apply to major acquisitions of securities, proxy contests, and going private transactions to require basic disclosure with respect to persons who are not so central to a control transaction that they are required to file disclosure with respect to themselves but who nonetheless, by virtue of their significant equity participation, are participants with respect to whom disclosure is material.

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106. 54 Fed. Reg., *supra* note 1, at 10,364.

