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Comment

BANK TENDER OFFERS: DEREGULATING WITHOUT LOSING CONTROL

"Among regulated industries, none is better insulated from hostile takeover than banking."¹

I. INTRODUCTION

Complex and conflicting state and federal rules discourage the acquisition of bank securities. Despite these regulatory difficulties, however, since financial institutions are highly profitable businesses they remain attractive takeover targets—particularly for other banks interested in expansion. By increasing their assets, banks can increase their lending limits to individual customers, thereby attracting large corporate borrowers.²

Maryland banks are especially desirable acquisition targets for a number of reasons. The Baltimore-Washington corridor has one of the highest per capita incomes in the United States,³ the economy is stable,⁴ and the area has strategic significance for entering new financial markets.⁵ There is also a high percentage of undeveloped commercially zoned land⁶ that will require industrial construction lending. Moreover, the passage of two interstate banking acts by the 1985 Maryland General Assembly⁷ will undoubtedly increase

² Both federal and state law restrict the amounts banks can lend to their customers and shareholders. For example, Maryland law limits loans to any individual customer to thirty percent (30%) of the unimpaired capital and surplus of the commercial bank. MD. FIN. INST. CODE ANN. § 3-601(a) (1980).
³ See MARKET ON THE GROW: PROFILE OF THE BALTIMORE-WASHINGTON CORRIDOR AND THE GREATER LAUREL AREA (n.d.) (available from the Greater Laurel Chamber of Commerce) (stating that the "per capita income of $12,802 is 20 percent higher than the national average and [the corridor's] effective buying power of more than $58 billion, fourth in the nation, is expected to be $101 billion by 1986"). See also The Baltimore Sun, Aug. 2, 1985, at 11D, col. 5.
⁴ The Baltimore Sun, Aug. 2, 1985, at 14D, col. 3.
⁵ Id. at 14D, col. 2.
⁶ Id. at 14D, col. 2.
⁷ Maryland’s statutory amendments, effective July 1, 1985, enable out-of-state bank holding companies to acquire Maryland banks upon Bank Commissioner approval if the holding companies come from a specified region or if, under special circumstances, they meet capital formation requirements and make significant contributions to Maryland’s economy without diverting capital from existing Maryland banks. See The
the number of bank takeover attempts in the state since certain re-
gional out-of-state banks and bank holding companies may now ac-
quire Maryland banking institutions for the first time.\footnote{See Friedman and Friesen, \textit{A New Paradigm for Financial Regulation: Getting From Here to There}, 43 Md. L. Rev. 413, 416-22 (1984).} This will
provide out-of-state banks with automatic access to the lending mar-
kets described above, but will not alleviate the difficulties involved
in bank acquisitions caused by confusing and conflicting federal
regulations.

To comprehend the intricacies of takeover attempts in the
banking industry, one must first understand how banks are regu-
lated, how they are owned, and the means by which they may be
acquired. The United States has a dual banking system made up of
national and state-chartered banks. Due to numerous past financial
crises,\footnote{Act of June 3, 1864, ch. 106, 13 Stat. 99.} the system is highly regulated. National banks, created by
the National Bank Act of 1864, are regulated by the Office of the
Comptroller of the Currency (OCC).\footnote{10. Act of June 3, 1864, ch. 106, 13 Stat. 99.} State banks are regulated by


\footnote{8. The Bank Holding Company Act specifically prohibits the Federal Reserve Board from granting authority for a bank holding company from one state to acquire any shares of a state bank from another state absent the latter state's enabling legislation. 12 U.S.C. § 1842(d) (1982 & Supp. III 1985). This section, known as the Douglas Amendment, was introduced as a compromise position during Senate floor debate between parties seeking full interstate banking, and those who wanted no bank holding company acquisitions across state lines. \textit{See} S. REP. No. 1095, 84th Cong., 2d Sess. 2, reprinted in 1956 U.S. CODE CONG. & ADMIN. NEWS 2482, 2492; \textit{see also} Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys., 105 S. Ct. 2545, 2550-53 (1985). For many years, the Douglas Amendment served to limit acquisitions of state banks by out-
of-state bank holding companies because no states passed permissive legislation. In 1976, Iowa passed limited legislation, and Maine, in 1975, legalized out-of-state bank holding company acquisitions of Maine banks for "companies" from states passing re-
ciprocal legislation. \textit{See} IOWA CODE ANN. § 524.1805 (West 1983); ME. REV. STAT. ANN. tit. 9-B, § 1013 (1980 & Supp. 1985). \textit{See generally} HAWX & PETERSEN, \textit{supra} note 1, at 640-46 (discussing the Douglas Amendment and its impact on interstate banking). The 1980s have seen significant activity in interstate banking; some states have passed permissive legislation which only allows bank holding companies from specific geographic regions to acquire in-state banks. \textit{See}, \textit{e.g.}, MASS. GEN. LAWS ANN., ch. 167A, § 2 (West 1984); 1983 CONN. ACTS § 83-411 (Reg. Sess.). In June, 1985, the Supreme Court of the United States held that regional banking statutes from Connecticut and Massachusetts did not violate the commerce, compacts, and equal protection clauses of the United States Constitution. \textit{Northeast Bancorp}, 105 S. Ct. 2553-56. This decision paves the way for the establishment of regional banking zones in various areas of the country and at the same time allows states to deny access to out-of-state banking giants. While the intricacies of regional banking, the Douglas Amendment, and \textit{Northeast Bancorp} are be-
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 beyond the scope of this Comment, it is important to understand that there will be an increase in bank acquisition activity resulting from the 1985 legislative session, and, as a result, tender offers will undoubtedly increase in number.

\footnote{9. See Friedman and Friesen, \textit{A New Paradigm for Financial Regulation: Getting From Here to There}, 43 Md. L. Rev. 413, 416-22 (1984).}
the Federal Reserve Board (the FRB) if they are Federal Reserve System members,\(^{11}\) or by the Federal Deposit Insurance Corporation (the FDIC) if they are insured non-member banks.\(^{12}\) Banks located in Maryland are also supervised by the Maryland Bank Commissioner.\(^{13}\) Finally, the Federal Home Loan Bank Board (FHLBB) regulates federally insured savings and loan associations which, although technically not banks, are subject to similar change-of-control regulations and legislation.\(^{14}\)

American banks can be privately or publicly owned. Some are owned by individuals, others by stockholders, and still others by bank holding companies, which are companies formed for the specific purpose of owning bank securities.\(^{15}\) Like other businesses, banks can be acquired through the purchase of assets, by merger, or by stock acquisitions such as tender offers. Tender offers involve attempts to acquire a controlling interest in a target bank through the purchase of a sufficient number of issued and outstanding shares owned by existing stockholders. In friendly tender offers, the target bank’s board of directors recommends that the shareholders accept the offer, and makes no effort to maintain control. In hostile situations, the existing board opposes the offer and affirmatively attempts to prevent the takeover by utilizing one or more of a host of tender offer defenses.\(^{16}\)

This Comment primarily concerns hostile tender offers for bank securities. It addresses differences between the Williams Act,\(^{17}\) which applies to all tender offers, and federal and state bank-

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11. Friedman and Friesen, supra note 9, at 421.
12. Id. at 422. "By the end of 1982, the FDIC had become the primary regulator for 8833 state-chartered non-member banks." Id. (citing FEDERAL DEPOSIT INSURANCE CORPORATION, 1982 STATISTICS ON BANKING 6 (statistics provided as of December 31, 1982)).
15. The Bank Holding Company Act of 1956 (the BHCA) defines a bank holding company, with certain specified exclusions, as "any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this act." 12 U.S.C. § 1841(a)(1) (1982). Companies owning or controlling bank stock may not be considered bank holding companies if they own or control shares in a fiduciary capacity, if they acquire bank stock in an underwriting capacity for a short period of time, or in four other specified circumstances. Id. §§ 1841(a)(5)(A)-(F).
16. See generally Goldberg, Regulation of Hostile Tender Offers: A Dissenting View and Recommended Reforms, 43 MD. L. REV. 225, 227 (1984) (tender offers "frequently involve a contest for control of the management of a company in transactions not subject to vote by the shareholders of either the offeror or target [bank]"). For a discussion of defensive maneuvers employable by the target company’s management, see Steinberg, Some Thoughts on Regulation of Tender Offers, 43 MD. L. REV. 240 (1984).
17. The Williams Act was enacted in 1968 as an amendment to the Securities Ex-
ing laws, which ensure the soundness of financial institutions and encourage full competition among American banks. The Williams Act places incumbent management and the tender offeror on an equal footing, so that neither has an advantage during takeover attempts.\textsuperscript{18} On the other hand, the banking laws and the regulations promulgated thereunder place grave restrictions on persons or corporations who try to acquire controlling interests in banks, and thus give incumbent management a distinct advantage over the offeror. The result is antithetical to the legislative intent behind the Williams Act.

Banking laws which govern changes in corporate control\textsuperscript{19} not only conflict with the Williams Act, but they also are inconsistent among themselves. They require that persons or organizations acquiring "controlling" interests in banks obtain prior federal and/or state approval. However, the laws contain different definitions of "control." Additionally, the approving agency will vary, depending on the bank being acquired and the business form of the offeror. The results can be desperately confusing because offerors must sometimes seek approval from different agencies at different times during the takeover process. Finally, the banking laws delay the acquisition process, enabling incumbent management to forestall any change in control, and sometimes to chill the tender offer completely.

To eliminate the confusion, discrepancies, and delays caused by the differences between the Williams Act and the banking laws, this Comment recommends changes in the manner in which persons acquiring controlling interests in banks obtain regulatory agency approval. The recommendations are three. First, to reduce existing confusion, the primary banking regulator should be responsible for any required approval, regardless of the offeror's business form. For the purpose of reducing discrepancies, the second recommended change is that banking laws should be amended so that their definitions of "control" are the same. Finally, to reduce delays, the approval period should be restructured so that the even-

\textsuperscript{18} See Steinberg, supra note 16, at 251 (arguing that putting the offeror and target corporation on equal footing helps ensure that shareholders can make informed decisions in deciding whether to tender their shares).

handed Williams Act approach applies to bank acquisitions as it
does to other tender offers.

Because the financial services industry is so highly regulated,
this Comment will not address every type of acquisition, or the leg-
islative and regulatory effect on every type of financial institution.
For example, although many of the same control acquisition restric-
tions apply to bank mergers as to tender offers, separate legislation
governs mergers.20 Also, similar acquisition restrictions apply to
banks, bank holding companies, and federally insured savings and
loan associations. In the interest of simplicity, this Comment will be
limited to a discussion of the acquisition of Maryland state-chartered
bank securities by individuals and bank holding companies. Finally,
since all bank regulatory agency change-of-control and tender offer
regulations are similar (with the exception of those governing acqui-
sitions by bank holding companies), only FDIC regulations will be
addressed in depth. FRB regulations will, however, be discussed to
the extent they apply to bank holding company acquisitions of state
bank securities.

II. THE LEGISLATIVE AND REGULATORY FRAMEWORK

There are three legislative elements affecting tender offers for
state-chartered non-member bank securities. First, if the tender of-
fer will result in an individual, group of individuals, or company
(other than a bank holding company) obtaining "control" of the tar-
get bank, the offeror21 must comply with the Change of Bank Con-
trol Act of 197822 (the Control Act) by notifying the primary
regulator (the FDIC) prior to the actual purchase of voting securi-
ties. Specifically, this means that the offeror may not acquire more
than ten percent of a bank's outstanding capital voting stock without
notifying the appropriate bank regulator sixty days before the acqui-
sition takes place.23 Maryland law also requires that similar notifica-
tion be made to the State Bank Commissioner.24

21. Since the scope of this Comment is limited to tender offers, the acquiring party
will hereinafter be referred to as the "offeror." In the event that a specific regulation
refers only to one type of offeror (e.g., a bank holding company), the offeror will be
referred to specifically.
statute defines "stock acquisition" as an acquisition of the outstanding voting stock of a
commercial bank or bank holding company in Maryland if the acquisition will affect the
Second, if the security acquisition is by a bank holding company rather than by an individual, the acquisition is governed by the Bank Holding Company Act of 1956\textsuperscript{25} (the BHCA), rather than by the Control Act. The BHCA requires that companies obtain FRB approval: (1) prior to becoming bank holding companies (i.e., obtaining twenty-five percent of a single bank’s securities); and (2) prior to obtaining five percent of a bank’s securities after the twenty-five percent threshold first is met.\textsuperscript{26}

When the BHCA applies to the security acquisition, the Control Act does not.\textsuperscript{27} For example, when a company that owns less than ten percent of a bank’s stock attempts to acquire more than twenty-five percent, the BHCA applies. The Control Act does not, even though the company acquires more than a ten percent ownership interest. Furthermore, whenever a company owning twenty-five percent of a bank’s securities attempts to increase its holdings of any bank’s securities by five percent or more, it must seek FRB BHCA approval again since it is, by definition, a bank holding company.\textsuperscript{28}

On the other hand, a company that reaches the ten percent mark without attempting to obtain twenty-five percent control as part of the same transaction must comply with the Control Act.

The third legislative element is that tender offer acquisitions must comply with section 14(d) of the Securities Exchange Act of 1934.\textsuperscript{29} The Securities and Exchange Commission does not regulate tender offers for bank securities.\textsuperscript{30} Section 12(i) of the Exchange Act\textsuperscript{31} vests in the primary banking regulator (the OCC, the FDIC, the FRB, or the FHLBB) the duty to administer and enforce certain provisions, including the Williams Act tender offer sections, when the target company is a bank or a federally insured savings and loan association.

The delays caused by the BHCA and Control Act reviews conflict with the intent of the Williams Act\textsuperscript{32} and the regulations\textsuperscript{33}

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\textsuperscript{26} Id. § 1842(a).
\textsuperscript{27} Id. § 1817(j)(16) (1982).
\textsuperscript{28} 12 C.F.R. § 225.2(d)(1)(i) (1986).
\textsuperscript{29} 15 U.S.C. § 78n(d) (1982).
\textsuperscript{30} Id. § 781(i).
\textsuperscript{31} Id.
\textsuperscript{32} See supra note 17.
promulgated thereunder. The securities regulations generally require full disclosure by both the offeror and target management whenever tender offers are made for shares in publicly held corporations, including banks and bank holding companies. Congress' Williams Act purpose was to ensure that shareholders received full and complete information to enable them to make informed choices when deciding whether or not to tender their shares. Congress did not intend, however, that either the existing board or the offeror have any advantage during a hostile tender offer. This neutral position is achieved by regulations that ensure that the offer proceed in a timely fashion. Any delay benefits incumbent management by providing more time for defensive "tactics" and allowing a "cooling off" period for the market.

In bank tender offers, state and federal statutes require full financial disclosure to, and approval from, federal and state regulators. Offerors may make a tender offer for shares prior to receiving the agency's approval, but they may not actually purchase the tendered shares until the agency completes its review. Thus, bank change-of-control regulations delay the process, giving the incumbent board of directors time to defend against the acquisition.

The delay is compounded because some acquisitions require the approval of four agencies: the primary regulator, the FRB, the Department of Justice, and the state banking supervisor. This can lead to "false starts" caused by proceeding under one agency's regulations when another's will ultimately be followed. This occurs, for example, when a person begins a tender offer in an individual capacity, and subsequently decides to form a bank holding company. In such a case, notice to the FDIC would be inapplicable, and the offeror would be required to send the FRB a new BHCA approval application, further delaying the process.

The federal and state banking laws and regulations not only delay tender offer consummation; their conflicting provisions also

35. See Steinberg, supra note 16, at 251.
36. Id.
38. See, e.g., 12 U.S.C. § 1817(j)(1) (notice must be provided to the FDIC at least 60 days before the stock acquisition takes place).
39. See supra note 34 and accompanying text. Essentially, the acquisition of control must be approved by either the FDIC, the FRB, or the OCC, and by the Bank Commissioner's office. Also, copies of bank holding company acquisitions are sent to the Department of Justice to ensure that antitrust violations do not occur. See infra note 97 and accompanying text.
present the incumbent board with a second advantage over the offeror in that there are many potential grounds to enjoin the tender offer. For example, when an individual offeror makes a tender offer for state-chartered non-member bank securities, the individual must notify the primary regulator (i.e., the FDIC) sixty days prior to the acquisition of control. If the FDIC does not disapprove the acquisition, the offeror may, on the sixty-first day, take down the tendered shares and acquire control of the bank. Conversely, if the offeror is a bank holding company, it must notify the FRB under the BHCA, and Regulation Y promulgated thereunder, rather than the primary regulator under the Control Act. The FRB has either thirty or sixty days to approve the acquisition. Unlike the Control Act provision, the lack of disapproval after the thirty or sixty day period is not sufficient; the FRB must approve or the acquisition cannot proceed. Moreover, the notification threshold begins at either five or twenty-five percent ownership under the BHCA, but not at ten, as is the case under the Control Act. Finally, to further complicate matters, and regardless of which federal change-of-control statute applies, the offeror must also seek prior review from the Maryland Bank Commissioner’s office. The Commissioner has sixty days to review the offeror’s proposal; if he or she does not disapprove the acquisition within that time, the tender offer may go forward.

Because of the conflicting BHCA, Control Act, and state provisions, the offeror must first determine which agency governs the transaction. If the offeror applies to the wrong agency, the tender offer can be enjoined. Where to apply should be a simple decision, since there is a primary regulator for each type of bank. For example, an offeror seeking state-chartered non-member bank securities should apply for FDIC approval. Complications arise, however, because the type of bank being acquired is but one factor that deter-

40. 12 C.F.R. § 303.15(a) (1986) requires that notice must be given upon the acquisition of ten percent control if the bank has issued securities subject to the Exchange Act registration requirements, and if “[i]mmediately after the transaction no other person will own a greater proportion of that class of voting securities.”

41. The Control Act states that no person shall acquire control unless the primary regulator has been given sixty days prior written notice and within that time has not issued a notice of disapproval. The agency may extend the sixty day notice period for a subsequent thirty day period without justification. 12 U.S.C. § 1817(j)(1).


43. 12 U.S.C. § 1842(a); 12 C.F.R. § 225.2(a)(2), 225.11.


45. See infra notes 99-100 and accompanying text.


47. Id. § 3-314(d).
mines from which agency approval is required. Congress requires bank holding companies to gain FRB approval, regardless of which type of bank they are acquiring. 48 Thus, if the incumbent board of directors successfully argues that an offeror is a bank holding company that did not seek FRB approval, management can obtain a preliminary injunction to halt the tender offer even though the offeror notified the primary regulator (i.e., the FDIC). 49

III. APPROVAL OF CONTROL—OBTAINING THE BANK REGULATOR'S BLESSING

The underpinning of the federal and state change-of-control requirements is to provide governmental review prior to any change in control of a banking institution. Governmental review is desirable to insure the continued financial viability of the nation's banks, 50 to promote competition, and to promote "the general purposes of the Glass-Steagall Act of 1933—to prevent unduly extensive connections between banking and other businesses." 51 However, meeting the review requirements delays acquisitions and the ability of tender offerors to rapidly take down shares.

A. The Change of Bank Control Act

The Change of Bank Control Act of 1978 (the Control Act) 52 delays and confuses the tender offer process. It provides that no person shall acquire control of an insured bank through a disposition of voting stock unless the appropriate federal agency has been given sixty-days' prior written notice, and within that time has not disapproved the acquisition. 53 This requirement applies to all federally regulated acquisitions by an offeror other than a bank holding company.

The Control Act accomplished a goal with which regulators had long been concerned. Prior to its passage, the FRB had to approve acquisitions by bank holding companies, but no agency reviewed acquisitions by individuals. Companies could find individuals to

48. See supra note 43 and accompanying text.
53. Id. § 1817(j)(1).
purchase bank stock for them, and so avoid the BHCA requirements. Alternatively, an individual could purchase the securities and hold them until the bank holding company qualified for stock ownership, and then sell the shares to the holding company. The Control Act put an end to this practice by making individuals obtain agency approval, and by providing civil penalties for those who did not.\textsuperscript{54}

The Control Act drafters' intent was to ensure full information disclosure to the federal reviewing authorities.\textsuperscript{55} Federal banking agencies can issue rules and regulations to reduce these disclosure requirements,\textsuperscript{56} but the Control Act remains a roadblock that makes it more difficult for both friendly and unfriendly tender offers to succeed. When the tender offer is friendly, the offeror may shy away from releasing personal and highly confidential financial information. When the offer is hostile, seeking and achieving notice that the acquisition will not be disapproved within sixty days becomes of paramount importance.

The Control Act requires the offeror to provide the reviewing authority with detailed information concerning the offeror and its business affiliations.\textsuperscript{57} For example, the offeror must provide a list of its material business activities for the last five years,\textsuperscript{58} any pending legal or administrative proceedings that are material,\textsuperscript{59} any criminal indictments or convictions,\textsuperscript{60} financial statements for each of the five preceding years (and interim financial statements for the period immediately preceding the acquisition),\textsuperscript{61} a description of how the offeror intends to make the acquisition,\textsuperscript{62} the source of the offeror's funds for making the acquisition and a full description of any

\textsuperscript{54} See id. § 1817(j)(15) (providing for a ten thousand dollar per day civil penalty for each day in which a violation of the Act continues to exist).

\textsuperscript{55} Id.

\textsuperscript{56} Id. § 1817(j)(13) permits the issuance of rules and regulations. Id. § 1817(j)(6) (the notice section) allows agencies by regulation to change the information required of the offeror. Some agencies have taken the Congress at its word and, for example, reduced the financial reporting requirements. See, e.g., 12 C.F.R. § 225.43 (1986), in which the OCC permits offerors to provide it with their most recent financial statement, rather than one for each of the most recent five years. This regulation makes eminently good sense since most individuals, no matter how wealthy, do not have complete financial, income, or source and application of funds statements prepared, in accordance with generally accepted accounting principles, every year for five years.


\textsuperscript{58} Id. § 1817(j)(6)(A).

\textsuperscript{59} Id.

\textsuperscript{60} Id.

\textsuperscript{61} Id. § 1817(j)(6)(B).

\textsuperscript{62} Id. § 1817(j)(6)(C).
loan associated with the acquisition, any plans for liquidation, merger, or changes in corporate management or structure, identification of any person involved with soliciting stock for the offeror, copies of all tender offer materials, and any additional relevant information. Since many investors prefer not to disclose this type of information, bank tender offers are often chilled before they get started.

The threat of disapproval also discourages tender offers for bank shares. The Control Act provides specific guidelines under which the regulatory agency can deny approval for acquisition of control. Specifically, approval may be denied when the primary regulator finds that: (1) the offeror’s financial condition might jeopardize the bank’s financial position or prejudice depositors’ interests; (2) the offeror’s (or proposed management’s) “competence, experience, or integrity” would prejudice the bank’s depositors’ interests; or (3) the offeror fails to provide the agency with adequate notification.

If unsuccessful at an agency acquisition approval hearing, the offeror may obtain judicial review before a United States Court of Appeals. Absent judicial reversal, agency Control Act disapproval prevents tender offer consummation.

While the Control Act financial disclosure requirements and the threat of disapproval stifle the bank tender offer climate, the real Control Act threat is that the delay caused during the sixty-day approval period will prevent completion of a hostile tender offer. The Control Act requires that offerors provide the regulatory agency with copies of all tender offer materials. The FDIC regulations, as an example, require the completion of a “Notice of Acquisition of Control,” with which the “tender offer materials” must be submitted, including the bidder’s offer, the related transmittal letter, press

63. Id. § 1817(j)(6)(D).
64. Id. § 1817(j)(6)(E).
65. Id. § 1817(j)(6)(F).
66. Id. § 1817(j)(6)(G).
67. As with many other Federal reporting requirements, the government has developed a form which the offeror may submit to satisfy the notification requirements. The FDIC version is entitled “Notice of Acquisition of Control” (FDIC Form 6822/01 (7/82)).
69. Id. § 1817(j)(5).
70. Id. § 1817(j)(6)(G). Offerors complete a “Notice of Acquisition of Control” to meet the Control Act requirements. Question nine on that form requires the offeror to “[p]rovide copies of all . . . advertisements making a tender offer to stockholders for purchase of their stock . . . .”
71. See supra note 67 and accompanying text.
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releases, advertisements, and other published materials which solicit, invite, or request tenders of securities.\textsuperscript{72} Therefore, the tender offer, if one is intended, must be made before the FDIC Control Act notice is sent. Even though the tender offer must be \textit{commenced} prior to the sixty day review period’s beginning, the shares actually may not be taken down until the agency has completed its review.\textsuperscript{73}

Whereas the Control Act prohibits the acquisition of shares before the end of the sixty-day review period, the Williams Act grants shareholders an absolute right to withdraw their tendered shares sixty days after the tender offer is made.\textsuperscript{74} Therefore, the incumbent board of directors can defeat the tender offer by delaying agency review, finding a “White Knight” to make an offer higher than the original offeror’s, and enticing shareholders to withdraw their shares after the sixty-day Williams Act period has elapsed to sell them instead to an offeror with whom the board of directors can do business.\textsuperscript{75}

The Williams Act regulations require that tender offers remain open only for twenty days,\textsuperscript{76} but bank tender offers must remain open longer because of the sixty-day Control Act notice period. Therefore, opposing bidders or the current board have forty extra days to mount a successful counter-offer or defense.\textsuperscript{77} Since tender offers become public knowledge on the day they are commenced, opposing bidders can immediately make counter-offers, with prior knowledge of the existing bid. If the sixty-day Control Act notice period expires, shareholders can withdraw their shares and accept

\textsuperscript{72} 12 C.F.R. § 335.501(b)(5)(1986).
\textsuperscript{73} 12 U.S.C. § 1817(j)(1).
\textsuperscript{75} A White Knight is “[a] party sought out by the subject company to make a competing offer—either a tender offer or an offer of merger—or to purchase and hold shares in the subject company as a party friendly to that company’s management.” Goldberg, \textit{Regulation of Hostile Tender Offers: A Dissenting View and Recommended Reforms}, 43 Md. L. Rev. 225, 239 (1984). Defensive measures of this nature can be defeated by the astute offeror. The Control Act entitles the offeror to proceed with the acquisition prior to the expiration of the sixty day approval period if he has received, from the agency, written notice that the agency does not intend to disapprove the action. 12 U.S.C. § 1817(j)(1). Therefore, it should be a cardinal rule for those intending to make tender offers to gain control of a bank that they request, at the time they submit their materials to the regulating Federal agency, specific notice from the agency after it has decided that the acquisition will not be disapproved.
\textsuperscript{76} See, e.g., 12 C.F.R. § 335.510(a).
\textsuperscript{77} Shares can ordinarily be taken down after fifteen days. 12 C.F.R. § 335.507(1). However, assuming that all potential shareholders do not tender their shares until the expiration of the Williams Act twenty day period, banks can have as much as forty extra days to mount a successful defense, since offerors cannot take down shares until the Control Act or BHCA review is completed. \textit{See supra} note 53 and accompanying text.
the second bidder's higher offer. Even though second offerors also must obtain FDIC approval prior to purchasing the tendered shares, they are given an opportunity to make their offer, and perhaps gain an advantage over the original offeror by making a higher bid during the lengthy approval process.\footnote{To further confuse the issue, technically, an acquisition resulting in control cannot begin until the sixty day period has elapsed. Any tender offer, therefore, could violate the Control Act if the acquisition activity began prior to the completion of the sixty day period. The government, however, is cognizant of this possibility, and has provided for it as follows. First, bidders are encouraged to phrase their tender offers in such a way that the bidder is only required to take down the tendered shares if the change of control application is approved. See, e.g., Offer to Purchase Shares of Common Stock of the American Bank at $12.00 Per Share Net by David C. Lensing, at 2 (Nov. 6, 1984)(available from the Federal Deposit Insurance Corporation, Washington, D.C.). Second, offerors are encouraged to request, at the time the change-of-control application is filed, a notice of intent not to disapprove the change of control. See supra note 75 and accompanying text.}

The Control Act thus impedes tender offers for bank securities by private individuals. In general, it does not govern acquisitions by companies. Corporate bank tender offers are, however, stymied by the Bank Holding Company Act of 1956, which predated the Control Act’s passage by twenty-two years.

\section*{B. The Bank Holding Company Act of 1956}

If a private investor or investing group decided, for tax purposes\footnote{Assuming the bank is in the position to pay dividends on its stock, the Federal income tax rates are more favorable if the dividend income is received at the corporate level rather than at the individual level because of the provision which allows the deduction of eighty-five percent (85%) of dividends received by a domestic corporation subject to income tax. I.R.C. § 243(a)(1) (1984).} or otherwise, to establish a company to own a controlling interest in bank securities, that investor or group would immediately run headlong into the Bank Holding Company Act (the BHCA), its amendments, and FRB regulations promulgated thereunder. Acquisitions by bank holding companies (companies having “direct or indirect control of a bank”)\footnote{12 U.S.C. §§ 1841-49 (1982 & Supp. III 1985).} are generally governed by the BHCA rather than the Control Act when the company acquires twenty-five percent of the bank's voting securities. As with the Control Act, the BHCA creates hurdles which discourage tender

\footnote{80. 12 C.F.R. §§ 225.1-.43 (1986). Known as Regulation Y, 12 C.F.R. § 225 governs the formation of bank holding companies, the acquisition of target banks, and the maintenance of bank holding companies to insure the soundness of the banking system.}
The FRB's position is that a bank holding company should "serve as a source of financial and managerial strength to its subsidiary banks ... ." Therefore, a rigorous approval process takes place both before a company first acquires a twenty-five percent interest in a bank's securities, and thereafter prior to additional acquisitions of five percent of any bank's voting securities. In the case of small one-bank holding companies, the FRB will not approve acquisitions when the acquisition debt exceeds seventy-five percent of the purchase price of the bank being acquired, "unless the owner can demonstrate that such debt can be serviced without reliance on the resources of the bank or bank holding company." With regard to other bank holding company acquisitions, the FRB may not approve applications if the acquisition would result in a monopoly or would lessen competition. Bank holding companies must be registered with the FRB, must report to the FRB, and must subject themselves to FRB examinations and inspections.

Regulations do not require the FRB to approve the formation of a corporation whose corporate purpose is to become a bank holding company. Rather, approval is required only when the corporation becomes a bank holding company by attempting to acquire twenty-five percent of the outstanding voting securities of a bank. Therefore, technically, no BHCA approval application need be made until the corporation seeks to acquire twenty-five percent control. Whenever the bank holding company seeks to acquire an additional five percent or more of any class of voting securities of a bank, it must again seek FRB approval.

The acquisition approval process is both time-consuming and confusing. Prior to filing the application, the bank holding company must publish in a local newspaper, on the same day for two consecutive weeks, a notice of the proposed acquisition. A copy of the first

83. See supra notes 7-8 and accompanying text for a discussion of the interrelationship between the BHCA and the recent changes in Maryland's interstate banking laws.
84. 12 C.F.R. § 225.4; see also Policy Statement on Formation of Small One-Bank Holding Companies, 12 C.F.R. § 225, Appendix B (requiring at least twenty-five percent (25%) equity capital in any acquisition by a small one-bank holding company).
85. 12 C.F.R. § 225, Appendix B.
86. Id. § 225.13(a)(2). The FRB may make an exception if the anticompetitive effects would be outweighed by the acquisition's positive effect on the "convenience and needs of the community." Id.
87. Id. § 225.5(a)-(c).
88. 12 C.F.R. § 225.2(d)(1).
89. Id. § 225.11(c).
90. Id. § 262.3.
such notice must accompany the application for FRB approval.91 After receiving the application, the FRB must, within ten business days, either accept the application, request additional information, or return the application if substantially incomplete.92 Once the application is accepted, review will take place either at the FRB for the region in which the target bank is located, or by the Board of Governors.93 If the FRB acts under its delegated authority, the review period is generally limited to forty-five days. A review by the Board of Governors generally takes sixty days, but may be extended. If the Board accepts the application, all action must be completed thereon within ninety-one days or the application will be deemed approved.94

When the FRB receives the application, it will give the State Bank Commissioner (or, in the case of a National Bank, the OCC) thirty calendar days to provide approval recommendations.95 The FRB will also send notice of the application to the Federal Register for publication, which will invite public comment for a thirty day period.96 This public comment opportunity provides target management and opposing offerors with a perfect opportunity to stymie the tender offer. By convincing the FRB that the bank holding company acquisition will be anticompetitive or monopolistic, they can obtain FRB rejection and stop the tender offer in its tracks.

Following the receipt of public comments, the FRB will act on the application. If the decision is to allow the acquisition, the BHCA requires that the approved application be sent to the Department of Justice for review of antitrust considerations. Because the Department of Justice has thirty days in which to challenge the acquisition,97 the offeror may take no acquisition action until thirty days after the approved application is sent.

91. Id.
92. Id. § 225.14(c).
93. Id. § 225.14(d)(1)-(2).
94. Id. § 225.14(g)(1).
95. Id. § 225.14(b).
96. Id.
97. Id. § 225.14(e); 12 U.S.C. § 1849(b)(1982). The BHCA incorporates the substantive provisions of the antitrust laws, including § 7 of the Clayton Act. Therefore, a review of anticompetitive effects takes place by the FRB. 12 U.S.C. § 1842(c). The BHCA also requires an additional thirty day waiting period while the Department of Justice reviews the application. 12 U.S.C. § 1849(b). This thirty day waiting period was part of the original BHCA, and therefore predates the thirty day pre-merger waiting period contained in the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a (1976) (currently 15 U.S.C. § 1892), by some twenty years. For a discussion of the relationship between the BHCA and Hart-Scott-Rodino, see Gorinson and Manishin, Garn-St. Germain: A Harbinger of Change, 40 Wash. & Lee L. Rev. 1313, 1344-45 (1983).
Regardless of whether the Board of Governors or the regional Reserve Bank reviews the application, the total elapsed time for acquiring approval is well beyond the sixty days' Williams Act timeframe.98 Like the analogous situation in which approval is sought under the Control Act, the offeror is at a distinct disadvantage when making an offer for bank shares because tendering shareholders may withdraw their shares before the offeror is legally permitted to take them down.

The relationship between the BHCA and regulations promulgated under the Control Act contains a basic inconsistency that can confuse tender offerors and lead to defensive litigation. The BHCA requires FRB approval when a bank holding company seeks to acquire twenty-five percent of the outstanding shares of a state-chartered non-member bank.99 The Control Act regulations require FDIC review before an offeror may try to acquire ten percent control.100 Even though acquisitions under the BHCA are specifically excluded from the provisions of the Control Act,101 the BHCA does not apply until a twenty-five percent interest is sought. Therefore, if a corporate offeror proceeds slowly to establish a position in a bank's securities before making a tender offer, it must seek FDIC approval under the Control Act prior to gaining a ten percent interest, and FRB approval under the BHCA before obtaining twenty-five percent of the bank's outstanding shares. Corporate offerors who acquire less than a twenty-five percent bank security interest can be enjoined from further activity for non-compliance with the Control Act. Because the obvious procedure would be for companies to apply under the BHCA rather than the Control Act, target management can delay and possibly kill the tender offer for failure to comply with the Control Act's ten percent provision.

After the bank holding company reaches the twenty-five percent threshold, the FRB must approve any further action resulting in the bank holding company's acquisition of five percent of any bank's voting securities102 until a majority interest is obtained (i.e., more than fifty percent).103 Because of the ten percent/twenty-five percent inconsistency (which could require application for approval under both Acts), any corporate offeror seeking to acquire control

98. See supra note 74 and accompanying text.
99. See supra note 88 and accompanying text.
100. See supra notes 23, 40 and accompanying text.
102. 12 C.F.R. § 225.11(c).
103. 12 C.F.R. § 225.12(c).
of more than twenty-five percent of a target bank's voting stock should make the tender offer prior to acquiring ten percent. In that case, approval must be sought only from the FRB under the BHCA, because once BHCA approval is required, the Control Act provisions no longer apply.104

C. Maryland Statutory Review

In addition to the two federal change-of-control statutes which delay and confuse the bank tender offer scenario, section 3-314 of the Financial Institutions Article of the Maryland Annotated Code compounds the problem for those who would attempt to acquire a Maryland bank.105 First, it delays acquisitions by requiring that an offeror intending "to make a stock acquisition" apply to the Bank Commissioner at least sixty days prior to the acquisition's effective date.106 The application must include a description of the acquisition, and "all other information that is available to inform the Bank Commissioner of the effect of the acquisition on the power to direct ... the management or policy of a banking institution or bank holding company."107 The Bank Commissioner has the statutory authority to deny the approval of the stock acquisition where the Commissioner determines that the acquisition would be "anticompetitive or ... threaten the safety or soundness of a banking institution."108 Any violation of the acquisition notification requirements of section 3-314 will result in the offeror's being prohibited from voting its shares for five years,109 although there is no divestiture requirement.

Furthermore, section 3-314 confuses the tender offer process because, with its broad terms and vague language, it provides little guidance for an offeror seeking to acquire a bank. The offeror is told only that "all" relevant data must be provided to the Bank Commissioner. Additionally, the discretion given the Commissioner to "deny approval that ... [the Commissioner] ... determines to be anticompetitive or to threaten the safety or soundness of a banking institution"110 is so broad that, if the Commissioner chooses, he or she may deny an application if the acquisition is "not

105. See supra note 24 and accompanying text.
106. Id.
108. Id. § 3-314(d).
109. Id. § 3-314(c).
110. Id. § 3-314(d).
in the public interest." Thus, the law is not clear as to what the offeror must submit to the Commissioner to ensure that its application is not disapproved, and incumbent management can seek to postpone or even stop the tender offer by claiming the acquisition is "not in the public interest."

The Financial Institutions Article was recently amended by the regional banking legislation passed by the Maryland General Assembly in 1985. Before 1985, the Commissioner was given broad discretion as to which characteristics to consider in granting or denying approval to acquire bank securities. With respect to acquisitions by out-of-state bank holding companies, the General Assembly has now provided some specific guidance for both the offeror and the Commissioner regarding the information to be submitted and considered. The statutes also provide capital stock and surplus requirements with which Maryland banks must comply prior to being acquired by out-of-state bank holding companies.

These changes have positive results. First, the Bank Commissioner has definable standards by which to determine whether or not to approve a bank acquisition, resulting in both a more informed and more structured review by the Commissioner’s office. Second, the prospective offeror will have specific guidance as to what to submit when seeking Bank Commissioner approval. In the past, standards were not evident, and meetings with the Commissioner were recommended so that guidance could be given. Now, at least for out-of-state bank holding company offerors, such meetings will not be necessary because the offeror will know with which requirements it must comply. The state banking community and potential offerors would benefit if the General Assembly would provide similar specific standards in section 3-314 for all offerors. The legislature should provide uniform application requirements such as those required by regulations under the Control Act, and by

111. Discussion with Maryland Deputy Bank Commissioner (Sept. 25, 1985). Two denials of applications have, in fact, been made on these grounds.
112. See supra note 7 and accompanying text.
113. See, e.g., Md. Fin. Inst. Code Ann. § 5-1003(a)(4)(Supp. 1985)(stating that the Commissioner must consider financial and managerial resources of the out-of-state bank holding company, the future prospects of the bank being acquired, the financial history of the bank holding company, whether the acquisition would result in an undue concentration of resources or reduction of competition, and the initial capital investments, the loan policy, the investment policy, the dividend policy, and the general plan of business of the out-of-state bank holding company with respect to Maryland banking operations).
114. Telephone interview with Maryland Bank Commissioner’s Office officials (June 28, 1985).
new section 5-1003 for acquisitions by out-of-state bank holding companies.

In sum, the federal and state change-of-control approval statutes require compliance with a time-consuming review process and with sometimes confusing provisions. The reviews cause delays, giving incumbent management the opportunity to fashion tender offer defenses. The statutes' confusing nature results in offeror mistakes, leaving open the litigation door. However, the Control Act, the BHCA, and the Maryland Annotated Code are not the only statutes with which the offeror must comply. Section 14(d) of the Securities Exchange Act applies to all tender offers.\textsuperscript{115}

IV. THE FEDERAL TENDER OFFER REGULATIONS

Securities regulations promulgated under the Williams Act require full offeror and target management disclosure whenever tender offers are made. This is to ensure that the shareholders, if they choose to tender their stock, do so with their eyes open. The Williams Act is designed to protect shareholders, not target management or tender offerors.\textsuperscript{116} Therefore, although it contains complex and comprehensive filing and disclosure requirements, the Williams Act also permits rapid completion of tender offers and equal protection for targets and offerors.

The Securities Exchange Act vests in banking regulatory agencies the authority to enforce some of its provisions. Section 12(i)\textsuperscript{117} provides that "the duties vested in the [Securities and Exchange] Commission to administer and enforce Sections 12, 13, 14(c), 14(d) [the tender offer section], 14(f) and 16, with respect to . . . all other insured banks are vested in the Federal Deposit Insurance Corporation."\textsuperscript{118} Thus, the FDIC enforces the Williams Act for tender offers for state-chartered non-member bank securities, regardless of whether the offeror is an individual or a bank holding company. Section 12(i) vests similar authority in the OCC, the FRB, and the FHLBB to regulate tender offers for securities of the financial institutions which they supervise.\textsuperscript{119} Acquisitions of bank holding com-


\textsuperscript{116} See Edgar v. MITE Corp., 457 U.S. 624, 634 (1982), in which Justice White stated, "[w]e . . . agree . . . that [in passing the Williams Act] Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice."

\textsuperscript{117} 15 U.S.C. § 78i(i).

\textsuperscript{118} Id.

\textsuperscript{119} Id. The FDIC, OCC, FRB, and FHLBB tender offer regulations closely parallel
company securities are regulated by the Securities and Exchange Commission, even though the bank holding company’s “principal activity . . . consists of the operations of one or more subsidiary banks.”

FDIC tender offer regulations\textsuperscript{121} require offerors for registered bank shares\textsuperscript{122} to meet certain notice and notification requirements. The purpose of these disclosure requirements is not to ensure financing adequacy or competition, as under the two federal banking acts. Rather, the tender offer regulations are designed to provide complete information to shareholders. On the commencement date of the tender offer, the offeror must complete and submit copies of the Tender Offer Statement (FDIC form F-13) to the FDIC, the target bank, any other bidder “which has filed a Form F-13 with the FDIC,” and each national exchange in which the target bank’s securities are registered.\textsuperscript{123} The offeror also must provide certain information to the FDIC. First, it must send copies of all “Tender Offer Materials,” including the material terms and conditions of its formal offer, the related transmittal letter by which shareholders are to tender their shares, and any “[p]ress releases, advertisements, letters and other documents” sent by the offeror to security holders which solicit tenders of the securities being sought in the tender offer.\textsuperscript{124} In addition, the offeror must send to the FDIC: any loan agreements concerning funds for acquiring securities; agreements or relationships between the offeror and the bank (including its officers or directors) or any other party with respect to the bank’s securities; any legal opinions concerning the tax consequences of the tender offer; any written instructions given to persons making an oral tender offer; and the prospectus relating to the offeror’s shares if an exchange offer is involved.\textsuperscript{125} The offeror must make addi-

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\textsuperscript{120} See Letter from Arthur F. Burns to Senator Thomas J. McIntyre, \textit{Fed. Sec. L. Rep.} (CCH) \S 80,172 (1975). The SEC also regulates the filing of consolidated financial statements by bank holding companies. 17 C.F.R. § 210.9-01 to \textperiodcentered .07 (1986).

\textsuperscript{121} 12 C.F.R. § 335.501-.520 (Subpart E-Tender Offers) (1986).

\textsuperscript{122} A state-chartered non-member registered bank is a bank, other than a national bank, which is not a member of the Federal Reserve System and whose shares must be registered with the FDIC because there are more than 500 shareholders. 15 U.S.C. § 781 (g).

\textsuperscript{123} 12 C.F.R. § 335.503(a). The F-13 is the FDIC’s equivalent of the SEC Schedule 14D-1. See 17 C.F.R. § 240.14d-100 (1986).

\textsuperscript{124} 12 C.F.R. § 335.501(b)(5)(i)-(iii).

\textsuperscript{125} \textit{Id.} § 335.512.
tional filings every time it changes the offer, as well as when the offer terminates.\textsuperscript{126}

Subpart E contains, in stark detail, the requirements of full disclosure to target bank shareholders. The offeror must disclose to all shareholders its identity, the identity of the target bank, the nature of the securities being sought, and the consideration being offered for them. The offeror must inform the shareholders of the expiration date of the offer, the dates before and after which shareholders may withdraw their securities, and the dates the securities will be taken down pro rata. The offeror must also disclose virtually all of the information required to be disclosed to the FDIC in the F-13.\textsuperscript{127} Thus, any past contracts, transactions, or negotiations with the target bank (F-13 item 3) must be disclosed as well as the offeror’s source and amount of funds (item 4), its “plans and proposals” (item 5), and, if a corporate offeror, its financial statements (item 9).\textsuperscript{128}

Under Subpart E, the offeror may notify shareholders of the tender offer commencement by “long-form publication” or by “summary advertisement.” A “long-form” publication contains all of the tender offer disclosures. A “summary advertisement” informs the shareholders of the material aspects of the offer and invites requests for further (full) disclosures (which must be promptly distributed). The offeror may also use a “long-form” or a “summary advertisement” publication followed by a distribution of the full disclosure materials to all shareholders appearing on the target bank’s shareholder lists.\textsuperscript{129} Depending on the facts and circumstances of the offer, adequate long-form or summary publication may require publication in a national newspaper, a regional or metropolitan newspaper, or a combination thereof.\textsuperscript{130} Any subsequent changes in the offer must also be made in a manner “reasonably designed to inform security holders of such change . . . .”\textsuperscript{131}

If the offeror decides to make distributions by mailing materials to shareholders appearing on the shareholder list, it must make “long-form” or “summary” publication prior to requesting the list from the target bank.\textsuperscript{132} The bank has the option of distributing the
materials or giving the list to the offeror so it may do so.\textsuperscript{133} In the case of a hostile tender offer, the offeror would want to obtain the list so it could make direct distribution. Targets, however, do not want offerors to have any direct contact with shareholders because, if the tender offer is unsuccessful, the offeror could later directly contact shareholders owning large blocks of stock either for block voting purposes, or for attempting to increase the offeror's own holdings by making individual purchases.\textsuperscript{134}

The offeror obtains a shareholder list by submitting a request to the bank's executive offices. The shareholder list request must include the offeror's identity and the class of securities being bought.\textsuperscript{135} Upon receipt, the bank must notify transfer agents and any other persons who will assist it in carrying out its regulatory obligations.\textsuperscript{136} It will then either ascertain that its most recently prepared shareholder list is "timely" (i.e., prepared within ten business days of the request) or, if not, prepare a new list.\textsuperscript{137} The bank will then elect whether to mail the bidder's tender offer materials or to give the offeror the list.\textsuperscript{138} If the bank chooses to make the distribution, the offeror must pay the bank for all distribution costs.\textsuperscript{139}

Tender offer regulations prohibit the offeror from holding open the tender offer for less than twenty days from the commence-

\textsuperscript{133} Id. § 335.505(a)(3).

\textsuperscript{134} Offerors are forbidden, by regulation, from retaining the list, a copy of it, or any information derived from it after the tender offer terminates, but if the offeror "remembers" the names of one or two large shareholders, it could use this information to its advantage. See 12 C.F.R. § 335.505(f).

\textsuperscript{135} Id. § 335.505(e).

\textsuperscript{136} Id. § 335.505(a)(1).

\textsuperscript{137} Id. § 335.505(a)(2).

\textsuperscript{138} See supra note 133 and accompanying text.

\textsuperscript{139} 12 C.F.R. § 335.505(f)-(g). The provisions also require that the bidder (1) elect whether or not to require the subject bank to send shareholders material changes to the tender offer materials; (2) make a long form or summary publication; (3) promptly deliver the tender offer materials to the target bank if it has chosen to make the shareholder distribution, including any amendments to the tender offer materials made subsequent to the initial offer; (4) advance to the bank the approximate distribution cost; (5) promptly reimburse the bank any amount in excess of the amount advanced; (6) promptly furnish requesting shareholders with copies of the tender offer materials; (7) return the shareholder list promptly after termination of the tender offer (if the bank elects to supply the bidder with the shareholder list rather than making the distribution itself); (8) not retain the list, a copy of the list, or any information derived from the list following termination of the tender offer; (9) mail, by first class mail, copies of its tender offer materials to each person whose name appears on the list; (10) send sufficient sets of materials to each clearing agency so that copies subsequently may be sent to beneficial owners of the securities being sought; and (11) reimburse the bank for costs incurred in its compliance with Subpart E.
ment date, or from increasing the offered consideration unless the tender offer remains open at least ten days from the date such an increase is first published. The offeror must also pay the promised consideration or return the securities at the end of the tender offer. The offeror may not extend the length of the tender offer without a press release or a public notice published by 9:00 a.m. eastern time of the day following the scheduled expiration date of the original offer. Further, the offeror must return securities to shareholders who make a timely request to withdraw their shares, and must take down securities pro rata if the tender offer is for less than all the securities in a given class. Finally, if the terms of the tender offer are varied after commencement, the increased consideration must be given to all security holders whose shares are taken down, regardless of whether the shares were taken down before the change in the tender offer.

V. JUDICIAL AND REGULATORY AGENCY INTERPRETATIONS

Much of the recent litigation involving corporate takeovers in the banking industry has concerned the constitutional issues relat-

140. Id. § 335.510(a).
141. Id. § 335.510(b).
142. Id. § 335.510(c).
143. Id. § 335.510(d).
144. Id. § 335.507(a).
145. Id. § 335.508.
146. 15 U.S.C. § 78n(d)(7) (1982). In addition to the specific state and federal requirements relating to the acquisition of control, and the tender offer requirements, any individual considering making a tender offer for bank securities should consider ramifications of owning or obtaining a controlling interest in a bank. First, federal and state law places restrictions on loans which banks can make to certain stockholders and directors. See, e.g., 12 U.S.C. § 1828(j)(2) (1982); 12 U.S.C. § 375b(1)-(3) (1982); Md. Fin. Inst. Code Ann. § 5-512 (Supp. 1985). Second, banks may not reduce their outstanding common or preferred capital stock without state (Bank Commissioner) and federal approval. 12 U.S.C. § 1828(i); Md. Fin. Inst. Code Ann. § 3-305 (1980 & Supp. 1985). Unsecured loans are generally limited to fifteen percent of the unimpaired capital and surplus, and secured loans are limited to twenty-five percent. 12 U.S.C. § 375(1). Loans in excess of this amount may not be made without the prior approval of the bank’s board of directors, with the interested director abstaining. Id. § 375b(2). Loans to stockholders and directors must be on the same terms, and at the same interest rate, as loans to other individuals, and loans involving a greater than normal repayment risk may not be made. Id. § 375b(3). Maryland law limits the liabilities of any one person to any commercial bank to thirty percent of the unimpaired capital and surplus of the bank. Md. Fin. Inst. Code Ann. § 3-601(b) (1980). Loans may not exceed ten percent, except that an additional twenty percent may be loaned if it is (1) approved by two-thirds of the board of directors, and (2) secured by obligations of Maryland, the United States, or a political subdivision. Id.
ing to interstate banking. However, decisions relating to the Control Act, the BHCA, and the Williams Act tend to demonstrate that "a company's ownership of a regulated business is one of the best defenses against an unwelcome acquisition," and "[a]mong regulated industries, none is better insulated from hostile takeover than banking." Not only will the various regulatory procedural traps ensnare the potential offeror, but the very threat of litigation due to the offeror's failure to comply fully with the regulatory requirements can bring the tender offer to a grinding halt. For example, as one target's board responded to a "bear hug" letter:

As you are aware, regulatory approvals require the submission of complete applications to the various regulatory authorities and an affirmative finding by them that the applicable statutory standards have been met . . . . [T]he Comptroller of the Currency requested and has not yet received 'detailed biographical data' . . . , 'definitive [financ- ing] information' . . . , [and] 'detailed financial statements for each of the investors' . . . . We are further advised that the application that you tendered to the State of New York Banking Department is not . . . complete . . . and has not been . . . accepted . . . . The federal Change in Bank Control Act . . . sets forth . . . specific disclosure standards . . . . Since the information required by the agencies had not been submitted . . . nor the requisite approvals obtained, it is premature for the Board to evaluate your proposed tender offer.

Judicial interpretations and FRB orders fully support a conclusion that Congress placed a greater burden on offerors for bank securities than was placed on tender offerors in general. In particular, one intent of Congress in passing the Williams Act was to ensure that neither management nor the bidder would have "any undue advantage that could frustrate the exercise of an informed choice" by investors in deciding whether or not to tender their shares. The BHCA and the Control Act both provide management with an arsenal of rules and regulations with which it can delay the proceedings and stymie the tender offer entirely. For example, in Federal Deposit Insurance Corporation v. D'Annunzio, a United States

147. See supra note 8 and accompanying text.
148. HAWKE & PETERSEN, supra note 1, at 646.
149. Id.
150. Id. at 606-07.
151. Steinberg, supra note 16, at 251.
district court acknowledged that the Control Act requires FDIC notification prior to obtaining twenty-five percent control. Further, the regulations promulgated thereunder require prior notification by one who acquires more than ten percent ownership if, "immediately after the transaction, no other person will own a greater portion of that class of voting securities." The court then determined that a group of individuals which when "push came to shove" would vote their stock as a group would exercise control of more than ten percent of the stock, and, as a group, would hold more stock than any other individual. Therefore, the court enjoined the individuals from assuming control of the bank because they had not complied with the Control Act's notification provisions.

In Riggs National Bank of Washington, D.C. v. Allbritton, the United States District Court for the District of Columbia issued a preliminary injunction against Allbritton's tender offer for 600,000 shares of Riggs stock. In so doing the court found possible Control Act violations, as well as violations of the Williams Act antifraud provisions. The history behind the Riggs case demonstrates graphically the regulatory hurdles placed in front of tender offerors.

Allbritton wholly owned Perpetual Corporation (Perpetual) and University Bancshares, Inc. (University), the latter being a one bank holding company. Perpetual wholly owned Pierce National Life Insurance Company (Pierce) which, in December 1980, owned 2.1 percent of Riggs outstanding voting stock. On December 4, 1980, Allbritton and University contracted to buy thirteen percent of Riggs stock, and on December 9, Allbritton, Pierce, and University filed their Control Act application. On January 13, 1981, the OCC notified Allbritton that it did not intend to disapprove the application. On January 22, Allbritton purchased 7.93 percent of Riggs outstanding voting stock and University purchased 4.98 percent (keeping it below the BHCA five percent threshold). On February 9, Allbrit-
ton made a tender offer for 600,000 shares of Riggs (about twenty percent of the outstanding shares). On February 25, Riggs petitioned the FRB to institute proceedings under the BHCA. On March 2, University sold its shares to Allbritton, making his individual holdings equal to 12.9 percent of Riggs outstanding shares. The FRB, on March 4, 1981, determined that Allbritton was acting as an individual, and because no company with which he was involved owned more than five percent of Riggs stock, no notice was required by the BHCA.\(^\text{159}\) However, this apparent victory before the FRB was not sufficient to ensure smooth sailing for the Allbritton offer.

On March 17, 1981, the United States District Court for the District of Columbia issued a preliminary injunction, which temporarily chilled Allbritton’s tender offer.\(^\text{160}\) The court held first that Allbritton violated section 14(e) by omitting a material fact in his offer by failing to disclose his personal finances. It so held because the target was a national bank; sixty-five percent of the voting shares would remain outstanding after the offer; and Allbritton’s nondisclosure of his net worth, the valuation of his major assets, the schedule of interest charges on the debt created to make the offer, the anticipated source of the interest payments, and the source of funds for principal repayment, was material.\(^\text{161}\)

The court then addressed the interrelationship between the Control Act and the tender offer materials filed under the Exchange Act.\(^\text{162}\) Allbritton notified the OCC of a potential tender offer prior to receiving the OCC’s consent to purchase 12.9 percent of the outstanding shares. When Allbritton distributed his tender offer materials in compliance with the Exchange Act and the OCC implementing regulations, he said that no further Control Act approvals were required. Riggs claimed that the OCC’s notification applied only to the January 22 acquisition of 12.9 percent, and not to the tender offer. Therefore, Riggs maintained, the tender offer violated the Control Act (because prior approval of the tender offer was not obtained) and the Williams Act (because Allbritton did not disclose in his tender offer materials that further approval from the OCC would be required).

Even though the OCC was aware when it issued its January 13 notice that Allbritton might eventually offer to buy as many as 700,000 shares of Riggs, the district court determined that Allbrit-

\(^{159}\) Id. See also Riggs, 516 F. Supp. at 169-70.

\(^{160}\) Riggs, 516 F. Supp. at 175.

\(^{161}\) Id.

\(^{162}\) Id. at 175-81.
ton may have failed to comply with the Control Act. Specifically, the Act requires OCC review prior to an individual's obtaining twenty-five percent control, or actual control (which the regulations consider to be ten percent). Even though the OCC reviewed and did not disapprove Allbritton's 12.9 percent acquisition, the court determined that 12.9 percent, in this case, might not be "actual control," and the OCC might have to review its decision prior to the offeror's obtaining twenty-five percent. The court said that "[a] contrary view of requirements under the Control Act and its regulations would raise the possibility of an acquiring person's gaining clearance at a 10% ownership level, and being free to make subsequent acquisitions regardless of any risk those purchases might pose to the target bank and its depositors." The court went on to say that Riggs had met its burden of showing that "it remains a matter of speculation whether or not the Comptroller has 'no objection' to Allbritton's acquisition of a controlling interest." Allbritton's statement in the tender offer materials that no further OCC approval was required was "not only a misstatement but also misleading in violation of Section 14(e) of the Williams Act." The court then temporarily enjoined Allbritton from proceeding with the tender offer, and Riggs successfully delayed its completion.

VI. CONCLUSIONS AND RECOMMENDATIONS

Banks should not be deregulated, but the regulations under which they operate should be consistent and clear, and should require efficiency on the part of the regulatory agencies. The banking acts and the Williams Act can and should coexist so that the agencies can ensure financial health and competition, offerors and target management can struggle for control on an equal footing, and
shareholders can be assured that they will receive all the information they need to intelligently determine whether to tender their shares.

Complex problems such as those presented in this Comment deserve solutions. A fine balance must be maintained between equal treatment under the Williams Act and adequate regulatory control under the banking acts. Of primary consideration should be the continued health of financial institutions so that no individuals ever lose money which they have deposited. The grim truth is that without adequate agency review and approval, unqualified investors can gain control of financial institutions and drive them into debt. The Maryland savings and loan crisis demonstrates this fact.

The conflict between the securities and banking laws exists because the laws were drafted with different purposes in mind. The Williams Act was designed to ensure that shareholders had full and accurate information when making important decisions about their corporate securities and that they were not defrauded. The Control Act and the BHCA were intended to ensure the continued financial viability of banks so that changes in control would not lead to monopolies, anticompetitive practices, or harm to the "conveniences and needs" of the communities the banks service. Both goals are commendable, but the acts conflict.

The Williams Act seeks equality for both the bidder and management. However, because of the extreme complexity found in the BHCA and the Control Act, the target bank's management is at a distinct advantage at the outset of any tender offer. The sixty-day approval deadlines provide management with extra time to defend. Tendering shareholders can withdraw their shares after sixty days under the Williams Act, and can accept a sweeter bid from a "White Knight." Management can seek injunctive relief, or can seek intervention by the applicable federal agency. By having so many regulatory remedies, the target bank can make the tender offer such an expensive proposition that the offeror may be forced to withdraw his bid. This is not to say that banks do not remain attractive targets. The acquisition of banks is, however, a difficult and expensive proposition in which only the most carefully laid plans will guarantee success.

In order to reduce the advantage it has given to target bank

169. Steinberg, supra note 16, at 251.
170. See, e.g., HAWKE & PETERSEN, supra note 1, at 46-47.
171. Steinberg, supra note 16, at 251.
172. See supra note 75 and accompanying text.
management, Congress should review the relationships among and between the Control Act, the BHCA, and the Williams Act. It should attempt to reduce the delays that the banking acts cause and make the acts more uniform, thereby reducing confusion. There are three relatively simple amendments that could be made. Each would allow the regulators to maintain control of bank ownership while complying with the Williams Act spirit.

First, responsibility for approving bank holding company acquisitions of bank securities should be removed from the FRB and given to the primary bank regulator. This change would make the primary regulator ultimately responsible for approving bank holding company acquisitions, as it now is responsible for acquisitions by individuals. For example, the FDIC should approve acquisitions of state chartered non-member bank securities, regardless of whether the offeror is an individual or a bank holding company. The FRB could still be required to review the application and make recommendations, but the contact point should be between the bank and the FDIC.

This recommendation is straightforward. Under the existing regulatory scheme, a classic example of over-regulation, the offeror must seek acquisition approval from numerous regulators and supervisors. The process would be simpler and more thorough and efficient if the offeror filed one application for acquisition approval with the primary federal regulator. That agency would seek and coordinate comments and recommendations from the FRB, the Department of Justice, and the appropriate state banking supervisor prior to granting approval.

The impact of this change would be dramatic. First, rather than having to file three or four applications, the offeror would have to file only one. Target management could not stifle offers by claiming that the offeror was not seeking approval from the appropriate agency. Second, the approval process would be coordinated. One agency, rather than three or four, would have ultimate responsibility for determining whether to approve the acquisition. Finally, uniform standards would be considered for all acquisitions of similar banks. For example, acquisitions of Maryland non-member state-chartered banks would be governed by FDIC guidelines, and offerors would be aware of the applicable standards. The state bank supervisor would make his or her recommendations to the FDIC based on these standards. The FRB would remain responsible for approving bank holding company aspects, and the Department of Justice would ensure that the acquisition was not anticompetitive.
The ultimate decision-maker, however, would be the primary bank regulator—either the FDIC, the FRB, the OCC, or the FHLBB.

A second change would reduce confusion between the BHCA and the Control Act provisions and would prevent duplicate filing requirements. The two acts have different security acquisition approval thresholds, which can result in enforcement under both acts. The BHCA's approval threshold is five percent ownership after the bank holding company acquires a twenty-five percent interest. The Control Act's regulations require agency review of acquisitions in which the offeror obtains ten percent of the target bank's securities if the securities are registered, and if there are no shareholders with larger holdings.

The Control Act and the BHCA have similar legislative purposes. When it passed the BHCA in 1956, Congress intended to maintain competition and financial stability when companies acquired control of banks. The purpose of the 1978 Control Act was to accomplish the same goal for individual acquisitions. Both acts ensure regulatory agency approval before one party, whether an individual or a company, gains "control." It was not Congress' intent for companies to have to seek approval under the Control Act at a lower security ownership threshold than they had to meet under the BHCA. This was, however, accomplished when the agencies drafted their Control Act implementing regulations.

The definition of "control" should be the same for both acts, and regulators should not be permitted to amend the definition as if by whim, as they have under the Control Act. In both the BHCA and the Control Act, Congress implied that the twenty-five percent level indicated that a controlling interest had been attained. Therefore, the preliminary review under both Acts should take place at that level. Thereafter, when either an individual or a company acquires a ten percent interest in a different bank, a subsequent review should take place to ensure that the acquisition will not result in reductions in competition and that the offeror is financially suitable. The effect of the change would be that companies would be required to file under the BHCA and individuals would be required to file under the Control Act, as Congress originally intended. In no circumstance would either party be required to file under both acts, which was not the intent of Congress but which is now the case.

A third recommended amendment to the banking acts would be to significantly reduce the time allowed for agency approval of the proposed acquisition, and to require uniformity in the manner in which approval is granted. As indicated throughout this Comment,
delays chill hostile tender offers, giving incumbent management an inherent advantage. Since the Williams Act permits shareholders to withdraw their tendered shares sixty days after tender offer commencement, under no circumstances should agencies be allowed to delay approval beyond that time.

Banking regulators maintain mountains of data on all of the banks they supervise, and there is no reason in our computer age for approval to take longer than forty-five days. When the primary regulator receives the tender offer materials and the control acquisition approval application, notice should be published within three days in the Federal Register, requesting public comment within thirty days. At the same time, relevant data should be sent to the Department of Justice for antitrust review, to the FRB for bank holding company review, and to the banking supervisor. Thirty-day deadlines should be imposed. Upon the receipt of all comments, the primary regulator would have twelve days to consider the comments and determine whether to deny the application. This could leave a fifteen-day cushion in which the offeror could take down the tendered shares, essentially giving it equal treatment under the Williams Act.

The second aspect of this proposal is that the Control Act and BHCA approval procedures should be the same. Currently, affirmative approval is required under the BHCA, but the Control Act permits acquisition as long as the approval application is not disapproved. Again, there does not appear to be a reason for this inconsistency. In order to ensure that the forty-five day deadline is met, agencies should be required to disapprove the acquisition within forty-five days if they intend to do so at all. This would permit offerors to take down shares earlier if they received notice of the agency’s decision “not to disapprove” as under current law, and would also ensure that under no circumstances would the offeror be forced to wait more than forty-five days before knowing whether or not the tender offer could proceed. If the offeror does not receive notice that the application is disapproved within forty-five days, control acquisition should be allowed.

Admittedly, these recommendations are not the only ones which would resolve the existing dilemma, and they are certainly subject to challenge. However, they are offered as a possible solution to the chilling effect of banking laws on tender offers, and will hopefully serve as a starting point for reform.

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