

MEMORANDUM

September 6, 1984

TO : Commissioner Treadway
Commissioner Cox
Commissioner Marinaccio
Commissioner Peters

FROM : David Martin

Attached is a memorandum setting forth the Commission's views concerning the most recent version of its Tender Offer Legislation. As you will recall, the Commission previously commented on the legislation when it was reported by the House Subcommittee on Telecommunications, Consumer Protection, and Finance on June 28, 1984. The legislation was considered by the House Committee on Energy and Commerce on August 2, 1984 and certain amendments were adopted that responded to some of the Commission's concerns. There remain, however, three provisions in the legislation which, based on previous Commission positions, we have assumed would be the basis of Commission objection. It is proposed that the Chairman forward the attached memorandum to Chairman Dingell and the members of his Committee, as well as Senators D'Amato and Garn.

It is essential that this memorandum be transmitted as soon as possible. I would, therefore, appreciate if you would let me know by tomorrow (Friday) should you have any suggestions.

Attachment

MEMORANDUM

September 6, 1984

TO: Chairman Shad
Commissioner Treadway
Commissioner Cox
Commissioner Marinaccio
Commissioner Peters

FROM: Daniel L. Goelzer *DGoelzer*
General Counsel

RE: Request by Representative Wirth for a Statement of
Major Cases Involving the Commission in the Tender
Offer Area

Attached is a listing summarizing major cases involving changes in corporate control in which the Commission has participated amicus curiae since July 1, 1981.

We are sending this listing for your information. We have forwarded the list to Peter Kiernan in the Office of Legislative Affairs for inclusion in Chairman Shad's response to Representative Wirth's requests for information.

Attachment

AMICUS BRIEFS RELATING TO CHANGES
IN CORPORATE CONTROL

Voisin v. Bartell Media Corp.

(S.D.N.Y., letter sent July, 1981) (letter to district court judge in response to her request for the Commission's views)

The Commission took the position that the statutory merger at issue in the case was not a tender offer subject to Sections 14(d) and 14(e) of the Exchange Act. The court so held. [1981-1982] Fed. Sec. L. Rep. (CCH) ¶ 98,486 (S.D.N.Y. 1982).

Edgar v. MITE Corp.

(Supreme Court, brief filed July, 1981)

The Commission argued that the Illinois Business Take-over Act violated the Commerce Clause and was preempted by the Williams Act. The Supreme Court held that the statute violated the Commerce Clause. Three of the six Justices reaching the merits of the case also found that the statute was preempted by the Williams Act. 457 U.S. 624 (1982).

Empire v. Ashcroft

(W.D. Mo., brief filed Aug., 1981)

The Commission argued that the Missouri takeover statute was preempted by the Williams Act. The court so held. 524 F. Supp. 898 (W.D. Mo. 1981).

General Steel Industries, Inc. v. Walco National Corp.

(8th Cir., brief filed Dec., 1981)

The Commission argued that a district court has authority, in a private action under Section 13(d) of the Exchange Act, to order equitable remedies in addition to corrective disclosure. This case was settled before the 8th Circuit rendered its decision.

Jacobs v. Pabst Brewing Co.

(D. Del., brief filed June, 1982)

The Commission argued that an implied private right of action exists under Section 13(d) of the Exchange Act in favor of shareholders. The court so held. 549 F. Supp. 1050 (D. Del. 1982)

Hanna Mining Co. v. Norcen Energy Resources Limited

(N.D. Ohio, brief filed June, 1982)

The Commission argued that the issuer corporation and its shareholders have a private right of action under Section 13(d) of the Exchange Act to seek equitable relief; that Section 14(e) of the Exchange Act applies prior to the

public announcement of a tender offer; and that the district court in a private action can order other equitable remedies in addition to corrective disclosure. The court so held. 574 F. Supp 1172 (N.D. Ohio 1982).

Liberty National Insurance Holding Co. v. Charter Co.
(11th Cir., brief filed October, 1982)

The Commission argued that an implied private right of action for equitable relief exists under Section 13(d) of the Exchange Act in favor of the issuer corporation when it seeks (i) injunctive relief to halt or correct alleged violations of Section 13(d) and (ii) other equitable relief. The court held that such a private right of action did not exist in favor of issuers under Sections 10(b), 13(d), 14(d) and 14(e). 734 F.2d 545 (11th Cir. 1984).

Sharon Steel Corp. v. Whaland
(S. Ct. N.H., brief filed Nov., 1982) (on remand from the Supreme Court following its decision in Edgar v. MITE)

The Commission argued that the New Hampshire takeover statute violated the Commerce Clause and was preempted by the Williams Act. The Supreme Court of New Hampshire held, on Sept. 30, 1983, that the statute violated the Commerce Clause. The court did not rule on the Williams Act issue. 466 A.2d 919 (N.H. 1983).

San Francisco Real Estate Investors v. Real Estate Investment Trust of America (1st Cir., brief filed Dec., 1982)

The Commission argued: (1) that a private right of action exists under Sections 13(d), 14(d), and 14(e) of the Exchange Act to seek injunctive relief to halt or correct alleged violations of those sections, as well as other equitable relief; and (2) that a district court has authority in a private action to order other equitable remedies in addition to corrective disclosure. The court stated that it did not need to reach the issue of the existence of a private right of action. It adopted the Commission's test on the district court's authority. 701 F.2d 1000 (1st Cir. 1983).

Indiana National Corp. v. Rich
(7th Cir., brief filed Jan., 1983)

The Commission argued that an issuer corporation has a private right of action for equitable relief under Section 13(d). The court so held. 712 F.2d 1180 (7th Cir. 1983).

Gearhart Industries, Inc. v. Smith International, Inc.
(5th Circuit, brief filed July 1984)

The Commission took the position that a district court has authority in a private action, under appropriate circumstances, to order traditional equitable remedies, in addition to corrective disclosure, for violations of Section 13(d) of the Exchange Act. As of July 31, 1984, the case was pending before the Fifth Circuit.