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Mr. John S. R. Shad
Chairman, Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

RE: Congressional Consideration of Amendments to Williams Act

Dear Chairman Shad:

I am writing to you concerning several important policy issues raised in the July 8, 1983 Report of the SEC's Advisory Committee on Tender Offers.

The Report recommends express federal preemption of state regulation of tender offers and control share acquisitions as well as speeding up of the tender offer process, especially as to securities tender offers. It also proposes a type of federal corporations law governing matters such as high-vote provisions, advisory votes by shareholders, repurchase of shares, and the necessity to proceed by tender offers for acquisitions above a given threshold.

Attorneys General view these issues as fundamental and the Committee's proposals unsound and at variance with vital state interests. At our annual meeting held last month, the National Association of Attorneys General adopted a resolution opposed to the thrust of the Report. The resolution supports federal legislation to empower states specifically to regulate tender offers and control share acquisitions so long as such regulation does not make it impossible to comply with federal regulation. A copy of the resolution, memorandum and draft bill that were before the meeting are enclosed.

The role of the states in this area is a crucial one. In the February 1 letter to you from members of the Senate Committee on Banking, Housing, and Urban Affairs you were asked, "What should be the involvement of states in regulating corporate takeovers?" This question is important because (1) most corporations law in the United States is state law; (2) until a few years ago, federal regulation under the federal securities statutes and regulation under state law coexisted nicely--state regulation was always valid so long as it did not make it impossible to comply with federal regulation; and (3) it has been state regulation that has provided periods of 50 to 60 days during which tender offers must be open, providing time for developing and disseminating adequate information to average investors and time for management of the target to best develop competitive bids yielding more money for the shareholders of the target. The Report advocates express preemption of state law and shortening the time during which offers would be open. We believe that public policy should promote both

competition and shareholder understanding once a hostile tender offer is launched. The Report is fundamentally at odds with this view.

We have noted that Arthur Goldberg, a former Associate Justice of the United States Supreme Court and a member of the Advisory Committee, filed a long dissent to the Report. He says, "The Report of the Advisory Committee makes no significant reference to protection of the public interest." Justice Goldberg proposes that upon the making of a hostile tender offer, there be a "cooling-off" period (applicable to the offeror and the target) and that such an offer should be subject to votes by the offeror and the target. There were also dissents, all raising basic questions, by three other members of the Advisory Committee.

The Report is almost solely "market-oriented", with little or no consideration of broader issues such as the effect of hostile tender offers on productivity, suppliers, workers, and communities.

We believe that all of this raises issues of such structural significance that Congress should have an opportunity to fully consider the matter before regulations are attempted. Accordingly, we request that the Commission withhold rulemaking until first obtaining Congressional decisions by legislation on the fundamental issues.

We are sending copies of this letter with enclosures to the chairmen and ranking minority members of the appropriate committees and subcommittees with jurisdiction over securities issues, with the request that hearings on the Report and related counter-proposals be held as soon as reasonably possible.

We would hope that the Securities and Exchange Commission would join in this request. We are also sending copies of this letter with enclosures to the other members of the Securities and Exchange Commission.

We know that private citizens who serve on committees such as the "Advisory Committee" often do so at great personal expense, and we therefore especially appreciate the efforts of the Committee to address this important issue.

Respectfully and sincerely yours,

C. Raymond Marvin

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Enclosures

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
SUMMER MEETING
June 22-25, 1983
Asheville, North Carolina

RESOLUTION

STATE JURISDICTION TO REGULATE
CONTROL SHARE ACQUISITIONS AND TENDER OFFERS

WHEREAS, the recent U.S. Supreme Court case of Edgar v. Mite, 102 S. Ct. 2629 (1982) has held the Illinois tender offer statute invalid as a prohibited burden on interstate commerce; and

WHEREAS, the effect of such holding has been to eradicate previously enacted state tender offer legislation, and has provided an impetus for subsequent lower federal court decisions to go beyond Mite; and

WHEREAS, the result of such judicial decisions has been to significantly decrease investor protection, to wit:

1. Shareholders of target companies have insufficient time to make their investment decisions;

2. It is now unlikely that the information provided to enable shareholders to make those decisions will be as accurate and complete as that mandated by state takeover laws; and

3. Shareholders of target companies are no longer able to realize the full value of their investments since the companies do not have sufficient time in which to secure competitive bids; and

WHEREAS, state takeover acts may be considered necessary to slow down the tender offer process, which, without such regulation, may result in the raiding of corporate treasuries, securities of questionable value being exchanged for securities of sound companies, the closing of local plants and offices, and further concentrations of economic power; and

WHEREAS, the particular economic and social climate of each state renders a decision to regulate tender offers peculiar to that State;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Attorneys General:

1. Strongly supports the adoption of federal legislation that expressly authorizes state regulation of tender offers and control share acquisitions so long as such regulation does not make it impossible to comply with federal securities regulation;

2. Urges Congress to amend the Williams Act, specifically to remove all barriers to state regulation imposed by the Commerce Clause in this area; and

3. Authorizes the General Counsel to transmit these views to the Congress, the Administration, and other interested officials.

Attorney General
Anthony J. Celebrezze, Jr.

June 15, 1983

MEMORANDUM TO THE ATTORNEYS GENERAL

Attached is the draft bill, dated 6/9/83, which Assistant Attorney General Barry Moses of my Office will move, on my behalf, and discuss at the Commerce Committee meeting of the NAAG Annual Meeting on the afternoon of Wednesday, June 22, 1983. This draft differs in one respect from an earlier draft of the same which you may have already seen. (The enclosed draft provides that only the state of incorporation of the offeree corporation shall have the right to regulate control share acquisitions and tender offers. The reasons for the change are set forth below.

The bill would restore to the states very nearly the freedom that they had to regulate tender offers and control share acquisitions before Edgar v. Mite, _____U.S._____, 102 S.Ct. 2629 (1982). In Mite, five justices, in a sweeping extension of the negative side of the commerce clause, found the Illinois tender offer statute invalid as a prohibited burden on interstate commerce. Implied preemption was also argued, but fewer than five Justices found preemption. Subsequent lower federal decisions have gone well beyond Mite.

Prior to these recent decisions, federal and state securities regulation co-existed comfortably. State regulation was considered valid if it did not make it impossible to comply with the federal regulation. Most states had adopted tender offer regulation. All

of that legislation was killed by MITE. Since MITE, Ohio adopted (in November 1982) legislation to regulate all contral share acquisitions. See, e.g., §§ 1701.01(Z) to (CC) and 1701.831 of the Ohio Revised Code. That legislation was carefully tailored to meet the tests of MITE and we believe it to be constitutional. There has, however, been no court decision concerning that legislation.

The attached draft legislation would, in large measure, restore the old status quo, which is appropriate in light of the fact that most corporate law in the United States is state law. States charter corporations. Aside from financial institutions, the federal government charters almost no corporations. Federal securities regulation has been regarded as setting only minimum standards, on which the states could build. Under the attached draft, Congress -- exercising its plenary commerce clause power and other institutional powers -- would expressly authorize state regulation of tender offers and control share acquisitions so long as such regulation does not make it impossible to comply with federal regulation. Thus, each state would, as it did prior to MITE, have a choice -- it would decide to regulate or not to regulate. At the same time, the draft bill deals with two widely-voiced criticisms of state tender offer regulation by (1) requiring state administrative proceedings or a required shareholder vote to be completed in 60 days and (2) restoring state jurisdiction over any given tender offer or control share acquisition to a single state (the state of incorporation of the offeree corporation).

In our opinion, the bill is clearly constitutional. Preemption,

a supremacy clause doctrine, is plainly within Congress' power to negate. Congress can exercise its plenary commerce clause powers to remove all barriers to state regulation imposed by that clause. See, e.g., Western and Southern Life Insurance Company v. State Board of Equalization, 451 U.S. 648, 101 S. Ct. 2070 (1982) construing the McCarran-Ferguson Act, 14 U.S. C §1011, et seq. The bill is to some extent based on McCarren-Ferguson; but unlike that Act, the bill would not oust any federal agency of any jurisdiction, since state regulation would be authorized only if such state regulation does not make it impossible to comply with federal regulation. In this important sense, the bill is many times more modest than McCarran-Ferguson.

The earlier draft circulated by NAAG would have provided that the single state which could take jurisdiction would be the state with most substantial contacts, such as payroll, assets, etc. In recent weeks, however, we have found that certain of the largest companies apparently do not have readily available breakdowns on such contacts. Thus, one of the central aims of the legislation -- clearly allocating jurisdiction to a single state -- would not be accomplished since litigation might well be necessary to determine which state would take jurisdiction. Thus, the attached draft, dated 6/9/83, reflects a change to provide that it will be the state of incorporation, and only the state of incorporation, which may take jurisdiction. This test can be easily and quickly applied.

As you are undoubtedly aware, and as is discussed in the Western and Southern Life Insurance Company, case supra, the Supreme Court has often held that the McCarran-Ferguson Act does

not attempt to deal with due process and equal protection questions arising under the 14th Amendment. We perceive no serious 14th Amendment problems in the enclosed draft, because the state of incorporation has traditionally been given huge power in regulating its corporations. In addition, Justice White's opinion of MITE was almost vehement in its choice of the state of incorporation as the proper regulator. Though Justice White's opinion was under the commerce clause, some of that reasoning would appear applicable to 14th Amendment issues. Indeed, the enclosed draft, as contrasted with the earlier draft, may be on more solid ground on this issue because it would select the state of incorporation as the sole regulator of control share acquisitions and tender offers, thus meshing nicely with Justice White's statements in MITE. Lastly, to the extent that there are any 14th Amendment issues lurking in this area, the enclosed draft does draw upon all Congressional powers to deal with them.

NAAG's endorsement of the attached bill would be very timely. The Securities and Exchange Commission's Advisory Committee on Tender Offers is due to issue its report on July 8th. The Chariman of the SEC has advocated express congressional preemption of state tender offer and control share acquisition legislation and has strongly suggested preemption even of other state securities legislation. Congressional hearings later this year seem highly probable. Thus, the role of the states is almost certain to be before Congress soon. In addition, given the strong Hamiltonian bent of the Supreme Court's decisions in the past few years, the model suggested

A BILL

To amend the Securities Exchange Act of 1934 to provide protection to stockholders of corporations which are the subject of control share acquisitions and tender offers and to clarify the relationship between federal and state regulation of control share acquisitions, tender offers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

The Securities Exchange Act of 1934 is amended by adding the following new section immediately after Section 14 and before Section 15:

Sec. 14A STATE REGULATION OF CONTROL SHARE ACQUISITIONS AND TENDER OFFERS

(a) For the purposes of this section the following definition shall apply:

(1) "Offeree corporation" means the corporation [and any other corporation (or corporations) which is (or are) consolidated with it for financial reporting purposes] whose securities are or are to be the subject of a control share acquisition or tender offer.

(2) "Offeror" means a person or persons who make a control share acquisition or tender offer, including those who intend to exercise, or direct the exercise of, jointly or in concert, any voting rights of the securities for which such control share acquisition or tender offer is made.

(3) "State administrative proceedings" mean any and all hearings, investigations or other inquiries conducted by or on behalf of a securities commission (or any agency or officer performing like functions) of any state.

(4) "Take jurisdiction" means the ordering of state administrative proceedings in connection with a control share acquisition or tender offer or the imposition of other conditions or requirements in respect of such a control share acquisition or tender offer.

(5) "Control share acquisition" means the offer to acquire or the acquiring by any means by any person or persons acting as a group, of beneficial ownership of shares of a corporation entitling the holder thereof to vote for the election of directors which, when added to all other such shares in respect of which such person or persons are the beneficial owners, would result in such person or persons being the beneficial owner or owners of one-fifth or more of the shares of the corporation entitled to be voted in the election of directors. For purposes of this subparagraph, a beneficial owner of shares of a corporation shall include any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares: (1) voting power, which includes the power to vote or direct the voting of such shares; and/or (2) investment power, which includes the power to dispose or to direct the disposition of such shares.

(b)(1) Nothing in this Act shall prohibit or in any way restrict a state from taking jurisdiction or otherwise regulating, in any manner, control share acquisitions or tender offers so long as the state's activities do not make compliance with the provisions of this Act impossible.

(2) In case any provision of state law or any state's activities make compliance with the provisions of this Act impossible and accordingly is illegal or invalid, such illegality or invalidity of state law or state's activities shall not affect any legal and valid application thereof.

(3) Congress hereby declares that the regulation of control share acquisitions and tender offers by the several states (to the extent that such regulation is not in conflict with this section) is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to such regulation by the several states. Control share acquisitions, tender offers, and every person engaged in the making of either, shall be subject to the laws of the several states relating to control share acquisitions and tender offers, to the extent that such laws are not in conflict with this section. This provision is an affirmative grant by Congress of jurisdiction to the several states.

No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating control share acquisitions or tender offers, unless such Act specifically so provides.

(c) The state of incorporation of the offeree corporation, and only such state, may take jurisdiction over any control share acquisition or tender offer.

(d) Any state administrative proceeding or shareholder vote concerning a control share acquisition or tender offer must be concluded within sixty days from the date on which the offer is first made.

(e) The following persons, and only the following persons, shall have standing to assert claims arising under Section 13(d), 14(d), or 14(e) of this Act, including claims for damages and equitable relief:

(1) Shareholders of the offeree corporation who are not officers or directors of the offeree corporation;

(2) The offeree corporation;

(3) An offeror, but not an unsuccessful offeror; provided, however, that any offeror may seek equitable relief;

(4) The Securities and Exchange Commission;

(5) Any person having responsibility for the administration of a state's securities laws;

(6) Any recognized bargaining unit which represents 10% or more of the employees of the offeree corporation.

(f) If a provision contained in this Section 14A is held invalid, all other provisions shall continue in full force and effect. If a provision of this Section 14A is held invalid in any of its applications, the provision shall remain valid for all other applications.

(g) This Section 14A is adopted by Congress in the exercise of the full scope of its constitutional power and authority under Article 1, section 8, clause 3 and Article 4, section 1, of the Constitution of the United States of America (respectively, the "Commerce Clause" and the "Full Faith and Credit Clause"), and section 5 of the Fourteenth Amendment to the Constitution of the United States of America (the "Due Process Clause").