STATEMENT OF JOHN S.R. SHAD,
CHAIRMAN OF THE SECURITIES AND EXCHANGE COMMISSION,
BEFORE THE HOUSE SUBCOMMITTEE ON TELECOMMUNICATIONS,
CONSUMER PROTECTION, AND FINANCE

MARCH 28, 1984

Statement of John S.R. Shad
Chairman of the Securities and Exchange Commission
Before Hearings of the House Subcommittee on
Telecommunications, Consumer Protection, and Finance
Concerning the Recommendations of the Securities and Exchange
Commission Advisory Committee on Tender Offers

Wednesday, March 28, 1984

Chairman Wirth and Members of the Subcommittee:

I. Introduction

The SEC appreciates this opportunity to testify on the Report of Recommendations of the Commission's Advisory Committee on Tender Offers.[1] The report addresses fundamental policy issues in the tender offer area.

II. Origins and Objectives of the Tender Offer Advisory Committee

The Commission established the Tender Offer Advisory Committee on February 25, 1983, to study the fundamental changes that acquisition practices have undergone since the Williams Act was adopted in 1968. In view of substantial changes in the size, nature and complexity of such transactions, the Commission concluded that it was appropriate to undertake a major reexamination of the tender offer process and to obtain recommendations for appropriate legislative and regulatory changes.

The Advisory Committee was requested to review tender offer practices and regulations and propose specific regulatory and legislative improvements for the benefit of all shareholders (i.e. shareholders of all corporations, whether potential acquirors, target companies or bystanders).

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[1] The Advisory Committee's Recommendations and the Commission's positions and proposed actions are included herein.

The eighteen distinguished members of the Advisory Committee included fourteen members of the business and financial community, and the legal and accounting professions, who have been actively involved in numerous tender offers as institutional investors, bidders, targets, arbitrageurs, investment and commercial bankers, attorneys and accountants, two academicians who have written extensively on the subject, a former Supreme Court Justice and a former state securities commissioner.[2]

III. Overview of Advisory Committee Meetings and Conclusions

All meetings of the Advisory Committee were open to the public. At its first meeting on March 18, 1983, the Advisory Committee reached agreement on the appropriate scope of its review, stating that it would consider the whole spectrum of acquisition techniques, but would focus on those issues which are common to acquisitions of control through purchases of equity securities from investors.[3] The Advisory Committee formed six working subcommittees, which held numerous informal meetings between the meetings of the full Committee.

The Advisory Committee held its second and third meetings on April 15 and May 13 in New York City. At these meetings each of the working groups reported on their activities and on their meetings with representatives of various government agencies, including Chairman Miller of the Federal Trade Commission, Chairman Volcker of the Federal Reserve Board and representatives of the Department of the Treasury. The Committee also discussed the tender offer experience and regulatory response in Great Britain with the Director-General of the London Panel on Take-Overs and Mergers. On June 2 the Advisory Committee held a full day meeting in New York

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[2] See Exhibit A for the members of the Advisory Committee.

[3] See Section I of the Advisory Committee's Agenda of Issues, which is attached as Exhibit B.

City for the purpose of receiving presentations from commentators and other interested parties, including Assistant Attorney General William Baxter.

At the Advisory Committee meeting in Washington D.C. on June 10, 1983, the Committee considered and reached agreement on the recommendations to be included in its final report. Committee members presented the report and discussed the recommendations with the Commission and senior staff on July 8, 1983. The Commission promptly delivered copies of the report to the members of this Subcommittee and the Senate Banking Committee.

The recommendations of the Advisory Committee were organized into the following categories: Economics of Takeovers and their Regulation, Objectives of Federal Regulation of Takeovers, Regulation of Acquirors of Corporate Control, Regulation of Opposition to Acquisition of Control, Regulation of Market Participants, and Interrelationship of Various Regulatory Schemes. In presenting the report, Advisory Committee Chairman Dean LeBaron emphasized (i) the Advisory Committee's reliance on competitive markets as the ultimate regulator; (ii) the Advisory Committee's desire to promote private investment systems and not hamper capital formation by heavy reliance on rulemaking; (iii) the Committee's goal of disclosure of meaningful information to all investors; and (iv) the Committee's preference for solutions which are characterized by flexibility, simplicity and lower costs.[4] The Commission endorses those principles.

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[4] See attached July 28, 1983 letter from Dean LeBaron, Chairman, Advisory Committee on Tender Offers, to Securities and Exchange Commission Chairman John S.R. Shad, transmitting the Report of Recommendations of the Advisory Committee on Tender Offers (Exhibit C).

IV. Commission Response to Advisory Committee Recommendations

The Commission commends the Advisory Committee for its outstanding efforts. Although faced with a demanding schedule, the Advisory Committee performed a comprehensive review of the acquisition process and presented the Commission with fifty thoughtful and comprehensive recommendations, including recommendations for legislative and regulatory changes.

The Commission staff has been engaged in a detailed analysis of the Committee's recommendations since they were received. The Commission considered the staff's analysis of the Committee's recommendations at an open meeting on March 13, 1984.

Of the recommendations, the Commission agreed with thirty-four,[5] qualified thirteen,[6] disagreed with six[7] and concluded that three require further study.[8] Because some of the recommendations have subparts, these numbers total more than fifty.

Of the recommendations, the Commission concluded that six[9] require federal legislation and fourteen[10] can be implemented under the Commission's existing rulemaking authority. No formal action is required on the remaining recommendations endorsed by the Commission.

The Commission's specific positions on each Committee recommendation are as follows:

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5 Recommendations 1, 3, 5, 6, 7, 8, 9(a), 9(c), 9(d), 9(e), 10, 11, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 34, 37(b), 39(b), 43, 44, 45, 46, 48, 49, 50.

6 Recommendations 2, 4, 9(b), 12, 13, 17, 18, 33, 35, 36, 38, 41, 42.

7 Recommendations 15, 19, 27, 37(a), 39(a), 40.

8 Recommendations 14, 16, 47.

9 Recommendations 13, 21, 38, 39(a), 41, 43.

10 Recommendations 5, 11, 12, 17, 18, 20, 22, 29, 37(b), 39(b), 44, 45, 46, 48.

COMMITTEE RECOMMENDATIONS AND THE COMMISSION [ ]
AND CONTEMPLATED ACTIONS

I. Economics of Takeovers and their Regulation

1. The purpose of the regulatory scheme should be neither to promote nor to deter takeovers; such transactions and related activities are a valid method of capital allocation, so long as they are conducted in accordance with the laws deemed necessary to protect the interests of shareholders and the integrity and efficiency of the capital markets.

The Commission agrees with this general proposition. It requires no specific action.

2. There is no material distortion in the credit markets resulting from control acquisition transactions, and no regulatory initiative should be undertaken to limit the availability of credit in such transactions, or to allocate credit among such transactions.

The Commission has limited expertise in this area, but agrees with this general proposition. It requires no specific action.

II. Objectives of Federal Regulation of Takeovers

3. Takeover regulation should not favor either the acquiror or the target company, but should aim to achieve a reasonable balance while at the same time protecting the interests of shareholders and the integrity and efficiency of the markets.

The Commission agrees with this general proposition. It requires no specific action.

4. Regulation of takeovers should recognize that such transactions take place in a national securities market.

The Commission agrees with this general proposition, which is consistent with Edgar v. MITE Corp.,[11] and the Commission's amicus briefs in MITE and Sharon Steel v. Whaland.[12] However, the Commission's agreement should not be construed to justify a wholesale preemption of state corporate law. No specific action is required on this recommendation.

5. Cash and securities tender offers should be placed on an equal regulatory footing so that bidders, the market and shareholders, and not regulation, decide between the two.

The Commission supports the general proposition that regulatory disincentives to exchange offers should be minimized to the extent consistent with investor protection. Implementation of this recommendation and recommendations 11 and 12 will be the final major steps in the integration of the Securities Act and the Exchange Act disclosure requirements. It will require an amendment to rules and administrative policies under the Securities Act.

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11 457 U.S. 624 (1982).

12 [Current] Fed. Sec. L. Rep. (CCH) ¶ 99,528 (N.H., Sept. 30, 1983).

6. Regulation of takeovers should not unduly restrict innovations in takeover techniques. These techniques should be able to evolve in relationship to changes in the market and the economy.

The Commission agrees with this general proposition. It requires no specific action.

7. Even though regulation may restrict innovations in takeover techniques, it is desirable to have sufficient regulation to insure the integrity of the markets and to protect shareholders and market participants against fraud, non-disclosure of material information and the creation of situations in which a significant number of reasonably diligent small shareholders may be at a disadvantage to market professionals.

The Commission agrees with this general proposition. It requires no specific action.

8. The evolution of the market and innovation in takeover techniques may from time to time produce abuses. The regulatory framework should be flexible enough to allow the Commission to deal with such abuses as soon as they appear.

The Commission agrees with this general proposition. It requires no specific action.

9. a. State Takeover Law. State regulation of takeovers should be confined to local companies.

The Commission agrees with this general proposition, which is consistent with MITE and the Commission's amicus program. It requires no specific action.

b. State Corporation Law. Except to the extent necessary to eliminate abuses or interference with the intended functioning of federal takeover regulation, federal takeover regulation should not preempt or override state corporation law. Essentially the business judgment rule should continue to govern most such activity.

The Commission agrees with the Advisory Committee's recognition of the general preeminence of state corporate law with respect to the internal affairs of a corporation. However, in the application of the business judgment rule in a change of control context, the Commission believes [ ] gave greater recognition to potential [ ] interest between management and shareholder [ ] action is required on this recommendation.

c. State Regulation of Public Interest Businesses. Federal takeover regulation should not preempt substantive state regulation of banks, utilities, insurance companies and similar businesses, where the change of control provisions of such state regulation are justified in relation to the overall objectives of the industry being regulated, do not conflict with procedural provisions of federal takeover regulation and relate to a significant portion of the issuer's business.

The Commission agrees with this general proposition. It requires no specific action.

d. Federal Regulation. Federal takeover regulation should not override the regulation of particular industries such as banks, broadcast licensees, railroads, ship operators, nuclear licensees, etc.

The Commission agrees with this general proposition. It requires no specific action.

e. Relationships with Other Federal Laws. Federal takeover regulation should not be used to achieve antitrust, labor, tax, use of credit and similar objectives. Those objectives should be achieved by separate legislation or regulation.

The Commission agrees with this general proposition. It requires no specific action.

III. Regulation of Acquirors of Corporate Control

10. Any regulation of one or more change of control transactions by either the Congress or the Commission should address the effects of such regulation in the context of all control acquisition techniques.

The Commission agrees with this general proposition. It requires no specific action.

11. The concept of integration of disclosure under the Securities Act of 1933 and the Securities Exchange Act of 1934, previously effected by the Commission in securities offerings for cash, should be extended to exchange offers.

The Commission agrees with this recommendation. It will require an amendment to rules and administrative policies under the Securities Act and the Exchange Act.

12. Bidders should be permitted to commence their bids upon filing of a registration statement and receive tenders prior to the effective date of the registration statement. Prior to effectiveness, all tendered shares would be withdrawable. Effectiveness of the registration statement would be a condition to the exchange offer. If the final prospectus were materially different from the preliminary prospectus, the bidder would be required to maintain, by extension, a 10-day period between mailing of the amended prospectus and expiration, withdrawal and proration dates. This period would assure adequate dissemination of information to shareholders and the opportunity to react prior to incurring any irrevocable duties.

The Commission agrees with this recommendation generally, reserving judgment on specific means of effecting the proposal. It will require an amendment to rules and administrative policies under the Securities Act.

13. No person may acquire directly or indirectly beneficial ownership of more than 5% of an outstanding class of equity securities unless such person has filed a Schedule 13D and that schedule has been on file with the Commission for at least 48 hours. Such person may rely on the latest Exchange Act report filed by the target company that reports the number of shares outstanding. The acquiror would have to report subsequent purchases promptly as provided by current law.

The Commission endorses closing the 10-day window period in Section 13(d). The Commission opposes a pre-acquisition filing requirement, because of its effect on the transferability of blocks of stock. The Commission proposes instead a requirement of immediate public announcement, next day filing of the Schedule 13D and/or a standstill until filing. The Commission's proposal will require an amendment to the Exchange Act.

14. No person may acquire voting securities of an issuer, if, immediately following such acquisition, such person would own more than 20% of the voting power of the outstanding voting securities of that issuer unless such purchase were made (i) from the issuer, or (ii) pursuant to a tender offer. The Commission should retain broad exemptive power with respect to this provision.

The Commission has serious reservations about this recommendation. Further study of the economic implications for the entire change of control area is required.

15. The Committee encourages the Commission to study means to strengthen the concept and definition of "group" or concerted activity.

The Commission has reviewed its rules and interpretations in light of this recommendation and concluded that additional action is not necessary at this time. The Commission will continue to monitor this area.

16. The minimum offering period for a tender offer for less than all the outstanding shares of a class of voting securities should be approximately two weeks longer than that prescribed for other tender offers.

The Commission is sensitive to the Committee's concerns regarding two-tier and partial offers but is not certain that the Committee's recommendation is the best way to address these concerns. This issue requires further study.

17. The minimum offering period for an initial bid should be 30 calendar days; for subsequent bids the minimum offering period should be 20 calendar days, provided that the subsequent bid shall not terminate before the 30th calendar day of the initial bid. In each case, the minimum offering period will be subject to increase, if the bid is a partial offer. The period during which tendering shareholders will have proration and withdrawal rights should be the same length as the minimum offering period.

The Commission believes the tender offer process should not be permitted to become so complex that it is understood only by investment professionals. See Recommendation 32. The Committee's recommendations with respect to the timing of tender offers are too complex and may disadvantage non-professional shareholders. Shareholders would be better served by a system that simply provides for prorationing and withdrawal throughout the offering period, and a required minimum 20-business day offering period. The Commission endorses the Committee's proposal to eliminate the automatic extension of withdrawal

rights upon commencement of a competing bid. The Commission intends to propose appropriate rule changes.

18. The minimum offering period and prorationing period should not terminate for five calendar days from the announcement of an increase in price or number of shares sought.

The Commission agrees that the offering period should be extended if there is an increase in price or the number of shares sought. Since prorationing and withdrawal rights are proposed to be required throughout an offer, any extension of the offer will automatically extend such rights. The Commission reserves judgment on the length of the extension, pending public comment on a proposed rule change.

19. Where the bidder discloses projections or asset valuations to target company shareholders, it must include disclosure of the principal supporting assumptions provided to the bidder by the target.

The Commission does not endorse this recommendation at this time. In 1982, the Commission determined not to adopt a requirement of disclosure of assumptions when it issued its policy statement on projections[13] and in 1979 when it adopted Rules 175 under the Securities Act and 3b-6 under the Exchange Act,[14] which provide a safe harbor for such disclosures.

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13 See Release No. 33-6383 (March 3, 1982).

14 See Release No. 33-6084 (June 25, 1979).

20. The Commission should review its disclosure rules and the current disclosure practices of tender offer participants to eliminate unnecessary or duplicative requirements, as well as inordinately complex or confusing disclosures. The Commission's rules should require a clear and concise statement of the price, terms and key conditions of the offer. In addition, the Commission should amend its rules to permit inclusion of the key conditions in a summary advertisement used to commence an offer.

The Commission agrees with this recommendation, and intends to propose appropriate rule changes.

21. The Commission should continue its efforts to facilitate direct communications with shareholders whose shares are held in street name.

The Commission agrees with this recommendation. In order to facilitate communications with beneficial shareholders, the Commission has implemented a broker-dealer program and recommended legislation to implement a program for banks and other nominees.

22. The Commission should require under its proxy and tender offer rules that a target company make available to an acquiror, at the acquiror's expense, shareholder lists and clearinghouse security position listings within five calendar days of a bona fide request by an acquiror who has announced a proxy contest or tender offer. The Commission should consider prescribing standard forms (written or electronic) for the delivery of such information.

The Commission agrees with this recommendation, and intends to propose appropriate rule changes.

23. Tender offer reply forms should be standardized to the extent possible to facilitate handling by brokerage firms, banks and depositaries.

The Commission agrees with this recommendation, and will assist private sector initiatives in this area.

24. Except to the extent there already exists such a requirement in a particular context, the price paid by an acquiror unaffiliated with the target company should not be required to be "fair" nor should federal law provide for state law-type appraisal rights.

The Commission agrees with this endorsement of current law. No action is required.

25. All shareholders whose shares are purchased in a tender offer should be entitled to the highest per share price paid in the offer.

The Commission agrees with this endorsement of current federal securities regulation. No action is required.

26. Current prohibitions of the purchase by a bidder of target company shares other than under the offer should be continued.

The Commission agrees with this endorsement of current federal securities regulation. No action is required.

27. All time periods should be defined in terms of calendar days.

The Commission believes that all time periods should continue to be defined in terms of business days. No action is required.

28. "Commencement" of a tender offer should continue to be determined by present rules, and time periods should continue to run from that date.

The Commission agrees with this endorsement of current federal securities regulation. No action is required.

29. Offering documents that are required to be mailed should be mailed within seven calendar days of commencement by announcement.

The Commission agrees with this recommendation, and intends to propose appropriate rule changes.

30. Voluntary extensions may be made by the offeror with any type of offer at any time before the commencement of the first trading day after the expiration date of the offer.

The Commission agrees with this endorsement of current federal securities regulation. No action is required.

31. Approval by shareholders of a bidder with respect to an acquisition should continue to be an internal matter between shareholders and management, subject only to applicable state law.

The Commission agrees with this endorsement of current law. No action is required.

32. The takeover process should not be permitted to become so complex that it is understood only by investment professionals.

The Commission agrees with this general proposition. No action is required.

IV. Regulation of Opposition to Acquisitions of Control

33. The Committee supports a system of state corporation laws and the business judgment rule. No reform should undermine that system. Broadly speaking, the Committee believes that the business judgment rule should be the principal governor of decisions made by corporate management including decisions that may alter the likelihood of a takeover.

The Commission agrees with this general proposition, qualified by its concerns regarding the application of the business judgment rule in change of control situations. See recommendation 9(b).

34. State laws and regulations, regardless of their form, that restrict the ability of a company to make a tender offer should not be permitted because they constitute an undue burden on interstate commerce. Included in this category should be statutes that prohibit completion of a tender offer without target company shareholder approval and broad policy legislation written so as to impair the ability to transfer corporate control in a manner and time frame consistent with the federal tender offer process. An exception to this basic prohibition may be

appropriate where a significant portion of the target company is in a regulated industry and where special change of control provisions are vital to the achievement of ends for which the industry is regulated. Where such change of control provisions cannot be justified in relation to the overall objectives of the industry regulations or where only a small portion of the target company is in the regulated industry, there should not ean automatic impediment to the completion of a tender offer. Rather, the tender offer should be completed with the regulated business placed in trust during any post-acquisition approval period. Further, no such regulation should interfere with the procedural provisions under the Williams Act.

The Commission agrees with this general proposition, and intends to continue to implement this policy through its amicus program, which has been effective to date.

35. Congress and the Commission should adopt appropriate legislation and/or regulations to prohibit the use of charter and by-law provisions that erect high barriers to change of control and thus operate against the interests of shareholders and the national marketplace.

The Commission shares the serious concerns of the Advisory Committee with respect to the effects of these devices but is not prepared at this time to concur in such a broad intrusion into state corporate law.

36. To the extent not prohibited or otherwise restricted, companies should be permitted to adopt provisions requiring supermajority approval for change of

control transactions only where the ability to achieve such a level of support is demonstrable.

a. Any company seeking approval of a charter or by-law provision that requires, or could under certain circumstances require, the affirmative vote of more than the minimum specified by state law should be required to obtain that same level of approval in passing the provision initially. Ratification should be required every three years.

b. Where a charter or by-law provision provides a formula for the required level of approval, which level cannot be determined until the circumstances of the merger are known, the formula shall be limited by law so as to require a vote no higher than the percentage of votes actually ratifying the charter or by-law provision. Ratification should be required every three years.

c. For a nationally traded company that has adopted a supermajority provision prior to the date of enactment of this recommendation, and for a local company with a supermajority provision which becomes nationally traded at a later date, shareholders must ratify the supermajority provision within three years after such date, and continue to ratify such provision every three years thereafter.

The Commission agrees with the Advisory Committee that implementation of super majority voting requirements should require comparable votes for adoption. As noted with respect to Recommendation 35, however, the Commission is not

prepared at this time to concur in such a broad intrusion into state corporate law. The Commission does not agree that such provisions should be subject to re-ratification after adoption. Therefore, the Commission does not plan to take actions to implement 36(a), 36(b), or 36(c).

37. The Commission should designate certain change of control related policies of corporations as "advisory vote matters" for review at each annual stockholders' meeting for the election of directors and for disclosure in the proxy statement.

a. Matters Covered. Advisory vote matters should include:

i. Supermajority provisions. To the extent not prohibited or otherwise restricted, charter provisions requiring more than the statutorily imposed minimum vote requirement to accomplish a merger, including provisions requiring super-majority approval under special conditions (e.g., "fair value" and "majority of the disinterested shareholders" provisions);

ii. Disenfranchisement. Charter provisions (other than cumulative voting and class voting) that abandon the one-share, one-vote rule based on the concentration of ownership within a class (e.g., formulas diluting voting strength of 10% shareholders, and "majority of the disinterested shareholders" approval requirements);

iii. Standstill agreements. Current agreements with remaining lives longer than one year that restrict or prohibit purchases or sales of the company's stock by a party to the agreement; and

iv. Change of control compensation. Arrangements that provide change of control related compensation to company managers or employees.

b. Proxy Statement Disclosure. Companies should be required to disclose all advisory vote matters in a "Change of Control" section of the proxy statement.

c. Vote. Shareholders should be requested to vote on an advisory basis as to whether they are or continue to be in favor of the company's policy with respect to the advisory vote matters disclosed in the proxy statement. The board would not be bound by the results of the advisory vote but could, in its own judgment, decide whether company policy should be changed on the advisory vote matters. The outcome of an advisory vote would have no legal effect on an existing agreement.

The Commission supports 37(b) and will propose for comment the concept of annual disclosure of certain change of control related policies. The Commission believes that the concept of advisory voting is problematic, however, and does not at this time support that element of the recommendation. Advisory votes have, by definition, no binding effect on directors. Such votes would subject corporations to considerable time and expense. The legal effect of advisory votes is unclear

and could only be determined through costly litigation. Moreover, such a requirement could interfere fundamentally with traditional principles of corporate governance and fiduciary obligations of management applicable under state law. Because of the costs of advisory votes and the uncertain benefits, the Commission, while commending the Advisory Committee's originality in formulating the concept, does not endorse it.

38. a. Change of Control Compensation During a Tender Offer. The board of directors shall not adopt contracts or other arrangements with change of control compensation once a tender offer for the company has commenced.

b. Change of Control Compensation Prior to a Tender Offer.

i. Disclosure. The issuer should disclose the terms and parties to contracts or other arrangements that provide for change of control compensation in the Change of Control section of the annual proxy statement.

ii. Advisory Vote. At each annual meeting, shareholders should be requested to vote, on an advisory basis, as to whether the company should continue to provide change of control compensation to its management and employees. The board would not be obligated by the results of the vote to take any specific steps, and the outcome of the vote would have no legal effect on any existing employment agreement.

The Commission shares the Committee's concerns with the adoption of change of control compensation in the face of a takeover and concurs in the Committee's judgment that such activities may so undermine the public's confidence in the integrity of the takeover process as to require a federal response. The Commission takes no position on whether this is best done through tax legislation or other federal regulation, but would be happy to assist in the preparation of such legislation.

The Commission would suggest distinguishing between arrangements entered into after a takeover is threatened and those adopted in the ordinary course of business. This avoids the substantial problems of separating "golden parachutes" from ordinary employment contracts. As noted with Recommendation 37, the Commission does not favor advisory votes at this time. The Commission does agree that, as is currently required, issuers should disclose change of control related compensation, regardless of the timing of its adoption.

39. a. In general, target company self-tenders should not be prohibited during the course of a tender offer by another bidder for the target company.

The Commission believes defensive issuer tender offers should be prohibited, and intends to propose appropriate legislation.

b. Once a third party tender offer has commenced, the target company should not be permitted to initiate a self-tender with a proration date earlier than that of any tender offer commenced prior to the self-tender.

The Commission agrees with this recommendation, and intends to implement it by appropriate rule changes, pending legislation on 39(a).

40. There should be no general prohibition of the counter tender offer as a defense. The employment of the counter tender offer should be prohibited, however, where a bidder has made a cash tender offer for 100% of a target company.

The Commission has serious concerns about the use of counter tender offers as defensive tactics. Management should bear the burden of proving that a counter tender offer is not motivated by management's self-interest and reflects a reasonable business judgment. No specific action is planned by the Commission.

41. Contracts for the sale of stock or assets to preferred acquirors should continue to be tested against the business judgment rule. During a tender offer, however, the issuance of stock representing more than 15% of the fully diluted shares that would be outstanding after issuance should be subject to shareholder approval.

The Commission supports the concept of requiring shareholder approval for the issuance of any securities representing more than 5% (not 15% as proposed by the Committee) of the class to be outstanding after issuance during a tender offer or proxy contest. Included within this concept would be options, warrants, convertible and other securities. The Commission supports the general proposition that state corporate law, subject to revised application of the business judgment rule in takeovers, should govern disposition of assets during a tender offer. The Commission intends to propose appropriate legislation.

42. The sale of significant assets, even when undertaken during the course of a tender offer, should continue to be tested against the business judgment rule.

The Commission supports this general proposition, subject to revised application of the business judgment rule.

43. Repurchase of a company's shares at a premium to market from a particular holder or group that has held such shares for less than two years should require shareholder approval. This rule would not apply to offers made to all holders of a class of securities.

The Commission agrees with this recommendation, and intends to propose appropriate legislation.

V. Regulation of Market Participants

44. The Commission should continue the current prohibition on short tendering set forth in Rule 10b-4. To ensure the effectiveness of that provision, the Commission also specifically should prohibit hedged tendering. The Commission agrees with this recommendation. On March 29, 1984, the Commission will consider a rule proposal to that effect.

45. In furtherance of the policy goals of Rule 10b-4, the Commission generally should require in a partial offer that all shares tendered pursuant to a guarantee be physically delivered, rather than permitting delivery only of the certificates for those shares to be actually purchased by the bidder.

The Commission agrees with this recommendation, and intends to propose appropriate rule changes.

46. Rule 10b-4 should be amended to include a specific prohibition of multiple tendering.

The Commission agrees with this recommendation, and, on March 29, 1984, will also consider a staff recommendation to adopt proposed amendments to Rule 10b-4 prohibiting multiple tendering by appropriate rule changes.

47. The Commission should revise its interpretation of Rule 10b-4 so that for the purposes of determining whether a person has a "net long position" in a security subject to the tender offer, call options on such security which a person has sold and which a person should know are highly likely to be exercised prior to expiration of the offer shall be deemed to constitute sales of the security underlying such options and therefore netted against such person's position in the security.

The Commission believes that the proposed interpretation is too subjective, thus making it difficult to administer and enforce. Therefore, the Commission does not endorse this recommendation, but intends to study the problem further.

48. Without commenting on the technical aspects of the proposal, the Committee recommends adoption of the Commission's proposed Rule 17Ad-14 under the Exchange Act.

The Commission has adopted Rule 17Ad-14, which requires bidders' tender agents to establish during tender offers an account with registered securities depositories to permit financial institutions participating in such depository systems to use the services of the depository to tender shares if desired.

VI. Interrelationships of Various Regulatory Schemes

49. Federal securities regulation of acquisition of corporate control should not impede or otherwise handicap the necessary and appropriate workings of federal antitrust regulations designed to review transactions for antitrust implications prior to their consummation.

The Commission agrees with this general proposition. No specific action by the Commission is required.

50. Premerger notification waiting periods under the Hart-Scott-Rodino Antitrust Improvements Act should be modified so as to take account of the required minimum offering period prescribed under the Williams Act and to avoid, to the extent practicable, delay in completion of a tender offer due to antitrust review.

The Commission agrees with this recommendation and intends to consult with the Federal Trade Commission (which administers Hart-Scott-Rodino), with a view to implementing this recommendation.

V. Conclusion

As discussed above, the Commission intends to submit legislative proposals to implement its responses to five of the Advisory Committee's recommendations[15] and to take rulemaking actions to implement fourteen.[16] The Commission would also be pleased to assist the Subcommittee in the preparation of legislation concerning golden parachutes.

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15 Recommendations 13, 21, 39(a), 41, 43.

16 Recommendations 5, 11, 12, 17, 18, 20, 22, 29, 37(b), 39(b), 44, 45, 46, 48.

EXHIBIT A

MEMBERS OF THE SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON TENDER OFFERS

Dean LeBaron, Chairman
President
Batterymarch Financial Management

Jeffrey B. Bartell, Esq.
Quarles & Brady
(former state securities commissioner)

Michael D. Dingman
President
The Signal Companies, Inc.

Frank H. Easterbrook
Professor of Law
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Joseph H. Flom, Esq.
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Honorable Arthur J. Goldberg
(former Supreme Court Justice)

Robert F. Greenhill
Managing Director
Morgan Stanley & Co., Inc.

Ray J. Groves
Chairman and Chief Executive
Ernst & Whinney

Alan R. Gruber
Chairman & Chief Executive Officer
Orion Capital Corporation

Edward L. Hennessy, Jr.
Chairman of the Board
Allied Corporation

Gregg A. Jarrell, Ph.D.
Senior Economist
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Robert P. Jensen
Chairman & Chief Executive Officer
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Martin Lipton, Esq.
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John W. Spurdle, Jr.
Senior Vice President
Morgan Guaranty Trust Company

Jeff C. Tarr
Managing Partner
Junction Partners

Bruce Wasserstein
Managing Director
The First Boston Corporation

EXHIBIT B

SEC Advisory Committee on Tender Offers
Agenda of Issues

Objectives: To review techniques for the acquisition of control of public companies ("takeovers") and the laws applicable thereto in terms of the best interests of all shareholders (i.e., shareholders of all corporations, whether potential acquirors, target companies or bystanders) and to propose specific legislative and regulatory improvements for the benefit of all shareholders.

I. Definition of Activities to be Reviewed.

The Committee has determined that, given the interrelationship of the various techniques to acquire control and the consequences of regulating one method of acquisition without taking into account the effect of such regulation on the relative advantages and disadvantages of other acquisition methods, it is necessary to consider the whole spectrum of acquisition techniques. The Committee recognizes, however, that given the anticipated date of its report to the Commission, it may not address in detail the full range of regulations, state and federal, applicable to proxy solicitations and mergers, but rather may focus on those issues that are common to such transactions and acquisitions of control through purchases of equity from investors.

II. Economics of Takeovers and their Regulation.

A. What is the economic effect of takeovers on:

1. acquirors and their shareholders – for example, what happens to an acquiror's financial condition, results of operations and stock price following an acquisition?

2. target companies and their shareholders – for example,

a. do takeovers provide a useful means of providing better management; and

b. does the prospect of takeover cause management to emphasize short-term results at the expense of long-term growth?

B. What is the relative effect of the following factors on the size and number of takeovers:

1. credit availability and policies;

2. tax policies;

3. antitrust policies;

4. market conditions;

5. general economic conditions;

6. accounting requirements (e.g., pooling, purchase, consolidation and equity accounting requirements);

7. laws applicable to change in control of regulated industries;

8. state takeover laws;

9. federal securities laws;

   a. 1933 Act (required registration of exchange offers)

   b. Williams Act

   c. other

10. state corporate law (e.g., fiduciary obligations); and

11. other?

C. What are the anticipated economic effects on acquirors, target companies, and the number and size of takeovers of adopting British type regulations that restrict or prohibit the ability of acquirors to:

   1. use two-tier pricing;

   2. engage in partial offers; and/or

   3. engage in open market accumulation programs at some defined level?

D. What is the economic effect on acquirors, target companies, their shareholders, and the number and size of takeovers of a regulatory environment that permits or encourages "auctions" of a target company?

E. What is the impact upon shareholders of the credit used to finance takeovers? Should the extension of credit for takeovers be regulated for the benefit of all shareholders?

III. Basic Objectives of the Federal Securities Laws Applicable to Takeovers.

The following issues are to be considered as an integral part of the Committee's consideration of the issues arising under captions IV, V, VI and VII.

Who should be protected under federal securities laws, what should the objectives of such regulation be and what premises should govern the balancing of these objectives?

A. Protection of shareholders (e.g., disclosure, proration, equality of treatment, substantive fairness).

B. Preservation of flexibility of business judgment for both the acquiror and target company.

C. Auctions of target companies.

D. Unfettered transfers of control.

E. Market liquidity and depth, efficiency in pricing. (Should takeovers be considered another dimension of market liquidity and thereby promoted under a mandate to extend market depth with full disclosure, promptness and reasonable cost?)

F. Ability of management to find alternative to takeover partners.

G. Neutrality (i.e. that the law have neither as its objective or effect, taking into account other regulatory objectives, the deterrence or promotion of takeovers).

IV. Regulation of Acquirors of Control.

A. To what extent can the procedures specified by law be made more uniform so that the current distinction between cash transactions and those using securities may be minimized? To what extent can the concept of integration of the 1933 and 1934 Acts be applied in the takeover area (where shareholders are compelled to make an investment decision) to streamline the procedures and disclosure required in connection with exchange offers and mergers?

B. Disclosure.

The primary purposes of the Williams Act are to assure that target company shareholders have the time and information to make informed investment decisions.

1. Are these purposes achieved by the current regulatory system?

a. Is the current required disclosure meaningful and of use to most shareholders?

b. Can some disclosure be eliminated or streamlined without lessening its effectiveness?

2. Should time and information continue to be the primary objectives of the law? Do such requirements serve the best interest of all shareholders?

3. What changes should be made in current disclosure requirements if disclosure continues to be a primary objective? For example:

   a. Should pro forma information be required in partial or proposed multiple step transactions?

   b. Should the accounting requirements with respect to purchase and pooling, consolidation and equity reporting be revised?

   c. Should tax disclosure be expanded and opinions of counsel on tax matters be required?

   d. Should projections of the target company given to the acquiror be required to be disclosed in its disclosure materials?

   e. Should tender offer materials be reviewed by the Commission prior to use as are proxy soliciting materials and registration statements used in connection with exchange offers and mergers?

4. Do acquirors and target companies have sufficient access to shareholders in an efficient, timely manner?

5. Do technological developments need to be taken into account in defining timing and disclosure requirements?

6. Do the current requirements under section 13(d) of the 1934 Act need revision? Is the disclosure required in the Schedule 13D useful to shareholders? Should acquirors be permitted to continue to purchase securities before the Schedule 13D is filed after the 5% threshold is reached? Should the criteria for reporting obligations be expanded to include any purchase that is part of an intended acquisition of control.

C. Terms of the Acquiror's Offer.

What substantive regulation should there be of the terms of the offer?

1. Price.

   a. Should it be required to be fair and if so by whose determination?

   b. Should all shareholders accepting the offer be entitled to the highest price paid in the offer?

c. Should Dutch Auctions be permitted or encouraged?

d. Should there be a limitation on, or prohibition of, two-tier pricing?

2. Limited Offers.

a. Should partial tender offers be permitted?

b. If partial offers are permitted, should shares be required to be accepted pro rata?

c. Should there be a limitation on open market accumulation programs?

3. Minimum Offering Period.

Should there be a minimum offering or solicitation period? If so, for what period?

4. Withdrawal Rights.

Should withdrawal rights be required? If so, on what basis?

5. Should states law rights of appraisal be incorporated in federal law?

D. Approval of Acquiror's Shareholders.

Should the acquiror have to obtain the prior approval of its shareholders of proposed major acquisitions and attendant financings?

V. Regulation of Opposition to Acquisition of Control.

A. Should state corporate law fiduciary obligations applicable to the board of directors be the principal means by which its activities are regulated? If so, should the "business judgment" rule continue to be the principal applicable standard?

B. If the business judgment rule is the appropriate standard against which to measure the board's actions, should there be different requirements (i.e. restrictions, requirements of shareholder approval or prohibition) with respect to one or more of the following actions:

1. Pac-man defense;

2. sales of "crown jewels";

3. target tender offers for their own shares;

4. use of employee benefit plans to defeat or deter tender offers;

5. "golden parachutes" and "silver wheelchairs" (i.e. employment and severance provisions that take effect upon a change in control);

6. lock-ups; leg-ups (e.g., sales of blocks of shares or options on shares to frustrate takeovers);

7. "shark repellents" (charter and by-law amendments to discourage takeover attempts);

8. "scorched earth" policies;

9. litigation; and

10. other defensive maneuvers?

C. Should the repurchase of shares by an issuer at a premium be proscribed?

VI. Regulation of Market Participants.

A. Is there a need to limit or prohibit short tendering, hedged tendering, double tendering?

1. What is the impact on the market and on the tender offer process of such practices?

2. Do such practices inordinately disadvantage the non-professional investor? If so, are there benefits to such investors that outweigh such disadvantages?

3. Is there a need to regulate substantively the tender guarantee mechanism?

B. Options.

Do problems exist in the tender offer process as the result of or because of the options markets? E.g., can and should there be a limitation on or other regulation of uncovered call writing during tender offers?

C. Clearing Systems.

Should regulations be adopted to require the use of depository book entry systems and/or require clearing corporations to maintain continuous netting programs during tender offers and to adopt uniform closeout and liability notice programs?

D. Risk Arbitrage.

Is there a need for substantive regulation of the activities of risk arbitrageurs?

VII. Interrelationship of Various Regulatory Schemes.

A. Should the Committee consider substantive issues with respect to tax, banking, antitrust, ERISA, etc. or limit itself to considering whether in general the various regulatory schemes eventually should or could be coordinated procedurally and/or substantively?

B. What is the proper relationship of federal and state securities and corporate laws and laws applicable to regulated industries?

1. Should there be state regulation of third party acquisitions of securities from shareholders (e.g., new Ohio statute)?

2. At present acquirors' activities are, as a practical matter, principally restricted by the federal securities laws, while the target's responses are, as a practical matter, principally subject to state regulation. Is this appropriate? If not, what should be done about it? What is the appropriate relationship between the federal securities laws and state laws applicable to changes of control of regulated industries?

VIII. Additional Issues.

A. See the additional issues raised by 12 members of the Senate Banking Committee in the attached letter.

B. What Commission enforcement presence is possible or appropriate, given the timing of control acquisitions? Are changes needed in the applicable laws to permit an effective enforcement presence?

C. To what extent do continuing changes in the law applicable to takeovers create inordinate difficulties for participants and shareholders?

EXHIBIT C

July 8, 1983

John S.R. Shad
Chairman
Securities and Exchange Commission
Washington, D.C. 20549

Dear Chairman Shad:

We are enclosing the final report of the Commission's Advisory Committee on Tender Offers which was established on February 25, 1983. The eighteen members of this Advisory Committee met six times in full session. Countless meetings of six sub-committees were held to prepare recommendations to the full body. We had the benefit of extensive experience of our individual members in completing our assignment within our original time frame.

The summary report emphasizes that we concentrated our work and recommendations on shareholders' interests. We are cognizant, however, of interest in takeovers on broader governmental, societal, jurisdictional planes and have touched on these issues in our work. We specifically address some questions put to us through the Commission that express Congressional concerns.

Our recommendations are detailed, technical and comprehensive. We expect the Commission to put them in place by rule making or by recommending legislation, or regulation, as may be required, as they stand. They are designed to be an integral and cohesive body.

I would like to point out the fundamental bases upon which our recommendations rest. There are other technical solutions which are consistent with our fundamental policy objectives. Throughout the meetings of the Committee we encouraged diversity of opinion and dissent. One of our functions was to bring out a number of ideas which might otherwise have become buried in a carefully negotiated majority view. We hope the Commission will draw upon this diversity of views in reaching your ultimate decisions.

The Committee respects the free market forces in the operation of the U.S. securities markets. Academic evidence is widespread that the takeover process is at least not demonstrably harmful to shareholders and some evidence points to its systematic benefits. We would be reluctant to restrict a process which seems to work reasonably well with the possibility that we might incur some unintended harm. The Committee is humble in its ability to anticipate all of the takeover innovations that are likely to occur; good and bad. Our instincts led us to rely upon competitive markets as the ultimate regulator for the unforeseen specifics that may affect security holders. Our recommendations should promote private investment systems rather than hamper capital

flows by heavy reliance upon rule making. We are attracted to solutions which are characterized by flexibility, simplicity and lower costs.

A theme running through our recommendations is to promote the disclosure of meaningful information to all investors. The tender offer process seems the best way available to us of insuring that terms, price and conditions are made available equally to all shareholders in a timely fashion. We suggest that purchases above 20% ownership be offered to all shareholders through the tender process.

We resist the temptation to bar substantial partial positions in companies. In most instances, we would expect that the acquisition of control would be accompanied by the purchase of all shares. There are circumstances in this country, as in international markets, where partial participation establishes business relationships which encourage cooperation and productive sharing of skills. We would not wish to alter these affiliations. We do, however, recommend that the partial positions receive somewhat less favored treatment than purchases which are contemplated to be for an entire company.

We are introducing an improvement in shareholder democracy in the form of advisory votes. We do believe that shareholders should have a mechanism to express their periodic will on charter provisions which may limit conditions under which their stock may be sold. Company directors, on the other hand, should not be bound to act against their business judgment in the shareholder interest. We do believe that the advisory vote concept will become a useful device in measuring shareholder sentiments.

We encourage procedures which will equate the offering of cash and securities. A number of purchases are accomplished initially for cash because Commission procedures are simplified for cash, and then are converted later into securities. Should cash and securities be administratively equated in the first instance, the latter potentially cumbersome and expensive step can be eliminated.

Throughout our discussions we have argued for simplicity in the procedures which may be required. This simplification may in some measure counteract the almost natural attraction to an elegance of rule making to guard against a number of perceived evils, especially those of recent anecdotal evidence.

Documentation by academic sources, business reports and the Commission staff were very helpful in our deliberations. We benefited from a review of takeover practices in other countries which included generous personal visits by United Kingdom and Canadian representatives.

The committee would have been unable to complete its work without the competence, diligence and hard work of the staff assigned to it. David Martin, Secretary to the Committee, did excellent work in keeping us administratively on track. Linda Quinn, Associate Director, diplomatically functioned in a continuing and important role.

Finally, we hope that the Commission and its staff will draw upon the Committee members for their advice and counsel in the future as you wish. Although we are disbanded with this report, our interest has not lessened and our willingness to serve remains keen.

Sincerely,

Dean LeBaron
Chairman
Securities and Exchange Commission
Advisory Committee on Tender Offers