UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
THE CHAIRMAN

MAY 21 1984

The Honorable Timothy E. Wirth
Chairman
Subcommittee on Telecommunications,
Consumer Protection and Finance
Committee on Energy and Commerce
House of Representatives
2454 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Wirth:

The Securities and Exchange Commission is pleased to transmit the attached legislative proposal to amend Sections 13(d) and 14 of the Securities Exchange Act of 1934 ("Exchange Act"). The amendments are the statutory changes the Commission proposed in its appearance before the House Subcommittee on Telecommunications, Consumer Protection, and Finance on March 28, 1984 when the Commission testified on the recommendations of its Advisory Committee on Tender Offers ("Advisory Committee"). In general, the amendments permit the Commission to require more timely announcements of acquisitions of significant blocks of securities and restrict specified defensive actions of target companies during tender offers. The legislation also limits the ability of companies to buy back their own securities at prices above the market from persons who have recently acquired such securities (i.e., "Greenmail" transactions).

More specifically, the legislation allows the Commission to require immediate public announcement of the acquisition of more than 5% of a class of equity securities and to revise the current deadline for filing of the statement of acquisition required by Section 13(d) of the Exchange Act. The legislation also permits the Commission to restrict the acquisition of additional shares for a period not to extend beyond the second business day after the filing. The Commission believes Section 13(d) needs revision because at present it permits acquirors to buy a substantial number of shares between the time they acquire more than 5% of the securities and the required filing date.

The legislation addresses certain compensation agreements known as "golden parachutes" by prohibiting a target company from increasing the compensation of officers and directors during certain tender offers. The Commission concurs in the Advisory Committee's judgment that such compensation increases, when granted during a takeover, undermine the public's confidence.

The legislation also prohibits a target company from acquiring its own securities during certain tender offers and from issuing significant amounts of securities without shareholder approval during such tender offers or during proxy contests. This latter restriction covers, among other techniques, the issuance of so-called "poison pills."

These restrictions on "golden parachutes" and defensive securities acquisitions and issuances apply only during tender offers that (i) are unconditional with respect to at least 10% of the outstanding class of the securities, and (ii) are made at a price at least 25% greater than the average market price for such securities during the 10 trading days prior to the commencement of the offer. The Commission is concerned that, without these threshold requirements, bidders would have undue power to block or inhibit legitimate corporate actions. The threshold levels should restrain sham tender offers commenced solely for the purpose of invoking these restrictions.

Finally, the legislation restricts the ability of a company to buy back any of its securities at a price above the market from any person who holds more than 3% of the class of securities to be purchased and has held such securities for less than two years. Such purchases would be permitted only upon prior security holder approval or if an offer of at least equal value were made to all holders of such class and any class into which such securities may be convertible. This prohibition is intended to deter the current practice of "greenmail".

The legislation allows the Commission to grant exemptions from these restrictions in order to avoid unintended or inequitable results and to provide for flexible administration in a rapidly-evolving area, consistent with the Commission's investor protection mandate.

The Commission believes that enactment of the Tender Offer Reform Act of 1984 would provide greater protection to shareholders by providing more timely disclosure of substantial acquisitions of the equity securities of a public company and by restricting certain defensive tactics. The Commission further believes that the proposed legislation would enhance shareholder protection without unduly intruding into state corporate law.

The views expressed here and in the accompanying material are those of the Commission and do not necessarily express the views of the President. These materials are being submitted simultaneously to the Office of Management and Budget ("OMB").

We will inform you of any advice received from OMB concerning the relationship of these materials to the program of the administration.

Sincerely,

John S.R. Shad

Letters sent to: The Honorable George Bush
The Honorable Thomas P. O'Neill
The Honorable Jake Garn
The Honorable William Proxmire
The Honorable Alfonse M. D'Amato
The Honorable Paul S. Sarbanes
The Honorable John D. Dingell
The Honorable James T. Broyhill
The Honorable Matthew J. Rinaldo

cc: Mr. James Frey
Office of Management and Budget

Ms. Katie Lewin
Office of Management and Budget

Attachments

A Bill to amend the Securities Exchange Act of 1934

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

Section 1. This Act may be cited as The Tender Offer Reform Act of 1984.

Section 2. Section 13(d)(1) of the Securities Exchange Act of 1934 is amended by striking the words "within ten days after such acquisition," and inserting in lieu thereof the following words: "within such time after such acquisition, and in such manner, as the Commission shall prescribe, announce such acquisition, and".

Section 3. Section 13(d) of the Securities Exchange Act of 1934 is amended by adding a new paragraph (7) as follows:

"(7) The Commission, by rule or regulation, in the public interest or for the protection of investors, may restrict or prohibit any person subject to the requirements of subsection (d)(1) of this Section from acquiring, directly or indirectly, beneficial ownership of any additional shares of the equity security that is the subject of the statement required by subsection (d)(1) for such time period subsequent to the acquisition subjecting such person to the filing requirement of subsection (d)(1) as the Commission shall designate, provided that such time period shall not exceed 2 business days after the filing of the statement required by subsection (d)(1)."

Section 4. Section 13(d)(3) of the Securities Exchange Act of 1934 is amended by inserting, after the word "acquiring," the word: "voting,". Section 13(g)(3) of the Securities Exchange Act of 1934 is amended by inserting, after the word "acquiring," the word: "voting,".

Section 5. The title of Section 14 of the Securities Exchange Act of 1934 is hereby amended to read as follows: "PROXIES AND TENDER OFFERS." Subsections 14(f) and 14(g) of the Securities Exchange Act of 1934 are redesignated as Subsections 14(j) and 14(k), respectively.

Section 6. The Securities Exchange Act of 1934 is amended by deleting paragraph 14(d)(2); redesignating paragraphs 14(d)(3) through (8) as paragraphs 14(d)(2) through (7); and adding new subsection (f) of Section 14, to read as follows:

"(f) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, voting, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for purposes of subsections (d), (e), (g), (h) and (i) of this Section 14."

Section 7. The Securities Exchange Act of 1934 is amended by adding thereto new subsection (g) of Section 14, to read as follows:

"(g) It shall be unlawful, during a tender offer for any class of securities of an issuer if (i) with respect to at least 10% of such class, the offer is unconditional and (ii) the offer is made at a price at least 25% greater than the average market price for such securities during the 10 trading days prior to the commencement of the offer, for the issuer to enter into or amend, directly or indirectly, agreements containing provisions, whether or not dependent on the occurrence of any event or contingency, that increase, directly or indirectly, the current or future compensation of any officer or director."

Section 8. The Securities Exchange Act of 1934 is amended by adding thereto new subsection (h) of Section 14, to read as follows:

"(h)(1) It shall be unlawful, during a tender offer for any class of securities of an issuer if (i) with respect to at least 10% of such class, the offer is unconditional and (ii) the offer is made at a price at least 25% greater than the average market price for such securities during the 10 trading days prior to the commencement of the offer, for the issuer to acquire, by a tender offer or otherwise, any of its securities, provided that an issuer may undertake routine acquisitions of securities through ongoing programs undertaken in the ordinary course of the issuer's business.

(h)(2) It shall be unlawful, during (i) a tender offer for any class of securities of an issuer if (A) with respect to at least 10% of such class, the offer is unconditional and (B) the offer is made at a price at least 25% greater than the average market price for such securities during the 10 trading days prior to the commencement of the offer, or (ii) a third party solicitation of proxies, consents, or authorizations from any holder of securities of an issuer, for the issuer to grant voting power or to issue any combination of securities, including, but not limited to, options, rights, warrants, convertible or other securities, which, upon granting or issuance, or if converted or exercised upon issuance, would in the aggregate constitute more than 5% of the issued and outstanding securities of a class or have more than 5% of the aggregate voting power of the issuer after such grant, issuance, conversion or exercise, unless the specific grant or issuance and its terms are approved by the affirmative vote of a majority of the aggregate voting securities of the issuer.

(h)(3) It shall be unlawful for an issuer to purchase, directly or indirectly, any of its securities at a price above the market from any person who holds more than 3% of the class of the securities to be purchased and has held such securities for less than two years, unless such purchase has been approved by the affirmative vote of a majority of the aggregate voting securities of the issuer, or the issuer makes an offer to acquire, of at least equal value, to all holders of securities of such class and to all holders of any class into which such securities may be converted.

Section 9. The Securities Exchange Act of 1934 is amended by adding thereto new subsection (i) of Section 14, to read as follows:

"(i) The Commission may, by rule, regulation or order, in the public interest or for the protection of investors, and subject to such terms and conditions as may be prescribed therein, provide exemptions from any or all of the provisions of subsections (g) and (h)."

Section 10. None of the foregoing shall be construed to limit or condition the authority of the Commission, in the public interest or for the protection of investors, to supplement the proration, withdrawal, and minimum offering periods applicable to a tender offer.

Section 11. This Act shall take effect immediately upon its enactment.

## ANALYSIS OF THE BILL BY SECTION

Section 1. The Act may be cited as "The Tender Offer Reform Act of 1984."

Sections 2 and 3. Sections 2 and 3 of the Act allow the Commission to close the "ten-day window" in current Section 13(d) of the Exchange Act. The legislation permits the Commission to require a public announcement and to specify the time, after the 5% acquisition, for filing the required statement and a length of time, not to exceed 2 business days after filing, for which additional purchases may be restricted.

Section 4. Current paragraphs 13(d)(3) and 13(g)(3) cover groups acting in concert for certain purposes. While the current language is intended to encompass groups acting for the purpose of voting securities, the term "voting" is added to these paragraphs for clarity.

Section 5. Section 5 of the Act amends the title of Section 14 and redesignates Sections 14(f) and 14(g) as Sections 14(j) and 14(k), respectively.

Section 6. Section 6 of the Act, adding new subsection 14(f), defines "person" for purposes of subsections (d), (e), (g), (h) and (i) of Section 14, to include a group of persons, utilizing language similar to current paragraph 14(d)(2). The statute thus makes explicit the definition's application to all tender offer provisions, which the Commission has interpreted as applying to current subsection 14(e). While the language in current paragraph 14(d)(2) covers groups acting for the purpose of voting securities, the term "voting" is included in new paragraph 14(f) for clarity and to ensure consistency with paragraphs 13(d)(3) and 13(g)(3), as amended by Section 4. The Act deletes paragraph 14(d)(2) as redundant and redesignates paragraphs 14(d)(3) through (8) as paragraphs 14(d)(2) through (7).

Section 7. Section 7 of the Act, adding subsection 14(g), prohibits an issuer, during certain tender offers, from entering into or amending, directly or indirectly, agreements containing certain compensation provisions.

This provision prohibits an issuer, during certain types of third-party tender offers, from entering into or amending agreements containing "provisions, whether or not dependent on the occurrence of any event or contingency, that increase, directly or indirectly, the current or future compensation of any officer or director." The prohibition does not prevent hiring new officers or directors, nor does it prohibit compensation increases, even during a tender offer, if such increases result from the provisions of an agreement pre-dating the tender offer. The Commission can, under Section 9 of the Act, exempt transactions by rule or order.

Section 8. Section 8 of the Act adds three substantive provisions:

(i) Paragraph (h)(1) prohibits, during certain tender offers, an acquisition by the issuer of any of its securities, and is self-executing. The breadth of the prohibition, covering all forms of issuer acquisitions, is necessary to prevent its evasion. The provision would not prohibit an issuer self-tender commenced prior to the commencement of a competing tender offer. The provision specifies that it does not prohibit routine acquisitions of securities through ongoing programs undertaken in the ordinary course of an issuer's business. This exemption would not apply to programs undertaken in response to the commencement of a third-party tender offer. In addition, the Commission can, under Section 9 of the Act, exempt transactions by rule or order.

(ii) Paragraph (h)(2) imposes a requirement for security holder approval by majority vote before an issuer can grant voting power or issue any combination of securities, including, but not limited to, options, rights, warrants, convertible or other securities which, upon granting or issuance, or if converted or exercised upon issuance, would in the aggregate constitute more than 5% of the issued and outstanding securities of a class or have more than 5% of the aggregate voting power of the issuer after such grant, issuance, conversion or exercise. Shareholders must approve the "specific grant or issuance" and its terms. The use of the word "terms" includes the identity of the person to whom the securities will be issued or voting power granted.

Paragraph (h)(2) applies during any third-party proxy solicitation, as well as during certain tender offers. This provision would also limit the issuance of securities with extraordinary conversion and/or redemption features, commonly referred to as "poison pills."

Paragraphs (g), (h)(1) and (h)(2) do not apply to all tender offers, regardless of their terms. Instead, they apply "during a tender offer for any class of securities of an issuer if (i) with respect to at least 10% of such class, the offer is unconditional and (ii) the offer is made at a price at least 25% greater than the average market price for such securities during the 10 trading days prior to the commencement of the offer." Without these restrictions, these paragraphs would place undue power in the hands of bidders to block or inhibit legitimate corporate actions. The threshold levels should prevent the commencement of tender offers simply to block such actions without a serious commitment by the bidder.

(iii) Paragraph (h)(3) prohibits issuer purchases of any of its securities at a price above the market from a person who holds more than 3% of the class of securities to be purchased and has held such securities for less than two years, unless (A) such purchase has first been approved by a majority of the aggregate voting securities of the issuer or (B) the issuer makes an offer "of at least equal value" to all holders of securities of such class and to all holders of any class into which such securities may be converted. By use of the phrase "any of its securities," the provision applies even if an issuer subject to paragraph (h)(3) does not seek to purchase all of the securities held by a person. Paragraph (h)(3) applies to both debt and equity securities.

By use of the term "value," the provision refers to current value. The use of the phrase "of at least equal value" would prohibit discriminating against other security holders in favor of the more than 3% holder. There may be instances where particular arrangements made at the request of the more than 3% holder are not necessary or desired by other security holders and the issuer prefers to offer the security holders an election between that arrangement and an alternative of at least equal value. This provision would permit such an election to be offered.

The phrase "at a price above the market" refers to any price above the current market value for the security. Situations may arise, for less-actively traded securities, in which the current market value is not ascertainable from last sale information or quotations. To deal with such situations, the Commission can use its authority, contained in Section 3(b) of the Exchange Act, "to define * * * terms used in this title, consistently with the provisions and purposes of this title." In addition, the Commission can, under Section 9 of the Act, exempt transactions by rule or order.

Section 9. Section 9 of the legislation authorizes the Commission to grant exemptions from new paragraphs (g) and (h) of Section 14. The intent of this provision is to prevent unintended or inequitable results by providing for flexible administration in a rapidly evolving area, consistent with the Commission's investor protection mandate. In addition, the Commission will have the authority, under current law, to define terms pursuant to Section 3(b) of the Exchange Act and to engage in general rulemaking, under Section 23(a) of the Exchange Act, to implement the Act.

Section 10. Section 10 makes clear that none of the provisions of the bill limit the Commission's authority to supplement proration, withdrawal, or minimum offering periods. The Commission has, and has exercised, this authority under existing law.

Section 11. Section 11 provides that the legislation will be effective immediately upon enactment. If circumstances so warrant, the Commission can use its exemptive authority to prevent unintended or inequitable results.

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF THE TENDER OFFER REFORM ACT OF 1984

## A. INTRODUCTION; NEED FOR LEGISLATION

At a meeting on March 13, 1984, the Commission considered the recommendations of its Advisory Committee on Tender Offers. On March 28, 1984, Chairman Shad testified before the House Subcommittee on Telecommunications, Consumer Protection and Finance concerning the Commission's positions on the Advisory Committee recommendations.

Several of the Commission's positions on the recommendations require legislation. As part of his testimony, Chairman Shad stated that the Commission intended to submit draft legislation to effect statutory changes it believed were necessary to implement the Commission's positions. At the March 28, 1984 hearings, Subcommittee Chairman Wirth requested that the Commission provide the Congress with the Commission's legislative proposals. The attached legislative proposal (the "Tender Offer Reform Act of 1984") is therefore being transmitted by the Commission to both houses of Congress for their consideration. The attached legislation is designed to effect those statutory changes the Commission believes are desirable in the tender offer context.

The Commission believes that passage of the proposed legislation would enable it to better carry out its investor protection responsibilities in the tender offer context.

B. THE COMMISSION PROPOSAL

In addition to several more technical provisions, the bulk of the legislation implements the Commission's response to the Tender Offer Advisory Committee recommendations in the following areas:

(1) The granting of "Golden Parachutes" by target corporations during certain tender offers should be prohibited by a federal legislative response;

(2) Issuer purchases of securities at a price above the market from those who have held them for less than two years should require security holder approval;

(3) The ability to accumulate shares for ten days after crossing the five percent threshold and before making public disclosure under Section 13(d) of the Securities Exchange Act should be proscribed;

(4) Issuer acquisitions for defensive purposes during certain tender offers should be prohibited; and

(5) The issuance of securities constituting over 5% of any class, or having over 5% of the issuer's aggregate voting

power, during certain tender offers or proxy contests should require security holder approval. 1/

Section 1 of the legislation contains its title.

Sections 2 and 3 of the legislation would allow the Commission to close the "ten-day window" in current Section 13(d) of the Exchange Act. The Advisory Committee concluded that the "ten-day window" between the acquisition of more than a 5% interest and the required filing of a Schedule 13D presents a substantial opportunity for abuse; the acquiror may hasten to buy as many additional shares as possible between the time the acquiror crosses the 5% threshold and the required public disclosure of the acquiror's holdings ten days later. The Commission agrees with the Advisory Committee's conclusion that the "ten-day window" should be closed. This will more effectively accomplish the congressional intent of alerting the issuer, the market, and all investors to rapid accumulations of equity securities. The Commission is concerned, however, that a pre-acquisition filing requirement -- recommended by the Advisory Committee -- could have serious economic consequences and affect the transferability of pre-existing blocks of equity. The Commission therefore favors closing the "ten-day

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1/ The Commission also testified in support of an amendment to Section 14(b) of the Securities Exchange Act of 1934 to authorize the Commission to regulate the proxy processing activities of banks and other nominees. Legislation to implement this program was approved by the Commission on April 12, 1984 and has been transmitted to the Congress.

window" in a manner that does not involve pre-acquisition filings.

The proposed legislation would permit the Commission to require immediate public announcement of a triggering acquisition, to specify the time, after acquisition of a 5% interest, for filing a statement, and to specify a length of time, not to exceed 2 business days after filing, for which additional purchases may be restricted. The legislation would not provide authority to impose a requirement of a pre-acquisition filing of the statement. As outlined in Chairman Shad's testimony on March 28, 1984, if this legislation is enacted, the Commission intends to consider adoption of a requirement of a public announcement on the day of the 5% acquisition, and a prohibition against further acquisitions until the Schedule 13D statement is filed.

Section 5 would amend the title of Section 14 to read "Proxies and Tender Offers." It would also redesignate subsections 14(f) and 14(g) as subsections 14(j) and 14(k).

Sections 4 and 6 of the legislation deal with the definition of the term "person." Section 6 would define "person" for purposes of subsections (d), (e), (g), (h) and (i) of Section 14 to include a group of persons. It would make explicit the application of that definition to all tender offer provisions. The Exchange Act currently applies the definition explicitly to Sections 13(d) and 14(d). The Commission has, by interpretation, applied the definition to existing Section 14(e) in the same manner. The new provision would also change the language of the definition of "person" in Section 14(d)(2) by explicitly referring to "voting," now covered implicitly by Section 14(d)(2). Section 4 of the Act would make this change in the language in current Sections 13(d)(3) and 13(g)(3) as well. Section 14(d)(2) would be repealed since the amendments described above would make it redundant, and paragraphs 14(d)(3) through (8) would be redesignated as paragraphs 14(d)(2) through (7).

Section 7 of the legislation would prohibit an issuer, during certain tender offers, 2/ from entering into or amending, directly or indirectly, agreements containing certain compensation provisions.

This provision would prohibit an issuer, during certain tender offers, from entering into or amending agreements that include "provisions, whether or not dependent on the occurrence of any event or contingency, that increase, directly or indirectly, the current or future compensation of any officer or director."

The chief advantage of this provision is the certainty that would result from a prohibition on any type of agreement that directly or indirectly increases the compensation of officers

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2/ Certain substantive provisions of this legislation are only triggered in the event of "a tender offer for any class of securities of an issuer if (i) with respect to at least 10% of such class, the offer is unconditional and (ii) the offer is made at a price at least 25% greater than the average market price for such securities during the 10 trading days prior to the commencement of the offer."

or directors. Although the prohibition is broad, it would not prevent hiring new officers or directors, nor would it prohibit compensation increases, even during the described category of tender offers, if such increases resulted from provisions of an agreement pre-dating the tender offer.

The Commission shares the Advisory Committee's concerns with the adoption of such agreements. The Advisory Committee noted that, when such forms of compensation are adopted during a tender offer, they can present the appearance of self-dealing on the part of management at a time of corporate vulnerability, as well as a failure by management to place first and foremost the interests of shareholders. The Commission concurs in the Advisory 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.

Section 8 of the legislation adds three substantive provisions to Section 14:

(i) Paragraph (h)(1) would prohibit issuer acquisitions of its own securities, whether by tender offer or otherwise, during certain third-party tender offers. While the Commission is generally reluctant to intrude into state corporate law, the Commission believes that an issuer acquisition during an unrelated bidder's hostile tender offer is an egregious misuse of the tender offer process and should be prohibited as a defensive tactic. The provision would not prohibit an issuer self-tender commenced prior to the commencement of a competing tender offer.

The broad language of paragraph (h)(1) is necessary in order to prevent circumvention of its prohibition. The provision specifies that it does not prohibit routine acquisitions of securities through ongoing programs undertaken in the ordinary course of an issuer's business. Such routine acquisitions would generally include, for example, routine purchases to fund employee benefit plans or to effect sinking fund redemptions. This exemption would not apply to programs undertaken in response to the commencement of a third-party tender offer. In addition, the Commission could, under Section 9 of the legislation (discussed infra), exempt transactions by rule or order.

(ii) Paragraph (h)(2) would impose a requirement for security holder approval by majority vote before an issuer can grant voting power or issue any combination of securities, including, but not limited to, options, rights, warrants, convertible or other securities which, upon granting or issuance, or if converted or exercised upon issuance, would, in the aggregate, constitute more than 5% of the issued and outstanding securities of a class or have more than 5% of the aggregate voting power of the issuer after such grant, issuance, conversion or exercise. Shareholders must approve the "specific grant or issuance" and its terms. The use of the word "terms" includes the identity of the person to whom the securities will be issued or voting power granted.

Paragraph (h)(2) would apply during third-party proxy solicitations, as well as during the special category of tender offers described in the statute. The restrictions would apply during all third-party proxy solicitations, not just solicitations with respect to securities registered under Section 12. 3/ Pursuant to its exemptive authority under Section 9 of the legislation, the Commission would exclude those solicitations which are not of the type that would evoke defensive responses -- for example, a solicitation on a shareholder proposal, such as one dealing with infant formula.

The Commission concurs with the Advisory Committee's conclusion that, above a certain level, the issuance of stock may foreclose competition altogether. In order to prevent evasion of these restrictions, the proposed legislation covers all types of securities, and issuances of securities during both proxy contests and tender offers. 4/

Paragraph (h)(2) would cover debt as well as equity securities. The provision therefore would regulate a wide variety of defensive issuance of securities, whether debt or

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3/ Subsection 14(a) applies to any security (other than an exempted security) registered pursuant to Section 12. The legislation, instead of incorporating this limitation, refers to any proxy solicitation.

4/ The Advisory Committee recommended a 15% threshold, but the Commission believes that a target company should not issue securities during a tender offer or proxy contest except in the ordinary course of its business or upon approval by shareholders. To this end, the Commission believes a 5% threshold, applicable to all classes of securities, should be adopted.

equity. The provision would also limit the issuance of securities with extraordinary conversion and/or redemption features, commonly referred to as "poison pills."

Paragraphs (g), (h)(1) and (h)(2) do not apply to all tender offers, regardless of their terms. Instead, they apply "during a tender offer for any class of securities of an issuer if (i) with respect to at least 10% of such class, the offer is unconditional and (ii) the offer is made at a price at least 25% greater than the average market price for such securities during the 10 trading days prior to the commencement of the offer." Without these restrictions, these paragraphs would place undue power in the hands of bidders to block or inhibit legitimate corporate actions. Were the prohibitions triggered by any tender offer for the issuer's securities, a bidder could make an offer below market or at a minimal premium, or subject to conditions unlikely to be satisfied, solely in order to restrict the target's ability to engage in legitimate corporate activities. Indeed, the threat to commence such an offer could spawn a new variety of "greenmail." The Commission's proposed threshold levels should prevent the commencement of tender offers simply to block such actions without a serious commitment by the bidder.

(iii) Paragraph (h)(3) would prohibit issuer purchases of any of its securities at a price above the market from any person who held more than 3% of the class to be purchased and had held such securities for less than two years (the so-called "greenmail" situation), unless the issuer obtained security holder approval by a majority of the aggregate voting securities of the issuer <u>or</u> the issuer makes an offer "of at least equal value" to all security holders of such class and any class into which such securities could be converted. By use of the phrase "any of its securities," the provision would apply to the purchase of <u>any</u> securities by the issuer, even if the issuer subject to paragraph (h)(3) did not seek to purchase <u>all</u> of the securities held by a person.

By use of the term "value," the provision refers to current value. The use of the phrase "of at least equal value" would prohibit discriminating against other security holders in favor of the more than 3% holder. There may be instances where particular arrangements made at the request of the more than 3% holder are not necessary or desired by other security holders and the issuer prefers to offer the security holders an election between that arrangement and an alternative of at least equal value. This provision would permit such an election to be offered.

The phrase "at a price above the market" refers to any price above the current market value for the security. Situations may arise, for less-actively traded securities, in which the current market value is not ascertainable from last sale information or quotations. To deal with such situations, the Commission could use its authority, contained in Section 3(b) of the Exchange Act, "to define * * * terms used in this title, consistently with the provisions and purposes of this title."

The Commission shares the Advisory Committee's concerns with a company's purchase of its securities at a price above the market from a dissident shareholder. 5/ As the Advisory Committee concluded, under current law a company's ability to make such purchases creates incentives for shareholders to accumulate blocks with the intent of selling them to the issuer at a profit. Such a transaction serves little business purpose and casts doubts on the integrity of the takeover process. The Commission believes that the substantial payoffs made by management to greenmailers also can erode public confidence in corporate management.

Section 9 of the legislation would authorize the Commission to grant exemptions from new paragraphs (g) and (h) of Section 14. The intent of this provision is to prevent unintended or inequitable results by providing for

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5/ The Advisory Committee's proposal dealt only with stock, but the Commission believes extending the proposal to all types of securities is necessary to prevent evasion of the prohibition. For similar reasons, the Commission has proposed that the exception for an offer to all holders of a class of securities include holders of a class into which such securities may be convertible.

flexible administration in a rapidly evolving area, consistent with the Commission's investor protection mandate.

Section 10 of the legislation is intended simply to make clear that none of the provisions of the bill limit the Commission's authority to supplement proration, withdrawal, or minimum offering periods. The Commission has, and has exercised, this authority under existing law.

Section 11 of the legislation would provide for its immediate effectiveness. Although there is no "grandfathering," the Commission would, if circumstances so warrant, use its exemptive authority to prevent immediate effectiveness of the legislation from having any unintended or inequitable results.

C. Rulemaking Authority.

Except with respect to Sections 2, 3 and 9, the legislation does not expressly provide specific rulemaking authority to the Commission; its provisions are self-executing. Paragraphs (g) and (h) of the legislation represent a significant intrusion into state corporate law and into corporate management practices. By making the provisions self-executing, Congress would be making a precise determination as to the scope of federal intrusion into these areas. However, the Commission could define terms, pursuant to its authority under Section 3(b) of the Exchange Act, and could exercise its general rulemaking authority under Section 23(a) of the Exchange Act, "as may be necessary or appropriate to implement the provisions of this title * * *."

D. <u>CONCLUSION</u>

The Commission believes that enactment of the Tender Offer Reform Act of 1984 would provide greater protection to shareholders by closing the Section 13(d) window and prohibiting certain defensive tactics. The Act, which implements the Commission's views on the recommendations of the Tender Offer Advisory Committee, would restrict abusive defensive tactics effectively without unduly intruding into state law.

For the reasons outlined above, the Commission urges that Congress enact the Tender Offer Reform Act of 1984.