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News Release

TWO-TIER TENDER OFFERS:
A MYTHECTOMY

Address to

The United Shareholders Association
Annual Meeting

Willard Hotel
Washington, D.C.

June 15, 1987

AND

The National Association of Manufacturers'
Congress of American Industry,
Government Regulation and
Competition Session

J.W. Marriott Hotel
Washington, D.C.

May 27, 1987

Joseph A. Grundfest
Commissioner

The views expressed herein are those of Commissioner Grundfest and do not necessarily represent those of the Commission, other Commissioners, or Commission staff.

Summary

In an address delivered before two separate groups, one generally opposed to takeovers (the National Association of Manufacturers) and one that generally supports a free market in takeover activity and more active shareholder control over corporate affairs (the United Shareholders Association), Commissioner Grundfest made the following observations about two-tier tender offers and pending takeover legislation:

Data suggest that two-tier bids have become all but extinct as a hostile takeover device in the past two years. Two-tier bids have, however, gained increasing popularity as a defensive technique. They are also used as a management LBO technique and as a means of financing friendly takeovers supported by target management. Therefore, to the extent that two-tier bids represent a coercive tactic,* such coercion may now be practiced more by corporate managements than hostile raiders.

Recently introduced legislation criticizes two-tier techniques when used by bidders. This legislation claims to be evenhanded because it seeks to limit "egregious defenses as well as coercive takeover tactics." However, this legislation is silent about the potential for coercion when essentially identical techniques are used by management. To the extent that legislation relating to two-tier offers is motivated by concern over shareholder coercion but addresses only hostile bids, and does not address coercion arising from management defensive maneuvers, questions are raised about the completeness, logic, and purpose of such legislative proposals.

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*Commissioner Grundfest questions whether hostile two-tier bids are coercive and, in this address, describes various competitive market forces, corporate charter provisions, poison pill plans, and court decisions that eliminate or ameliorate the possibility of coercion or abuse arising from two-tier bids. However, for purposes of this address, Commissioner Grundfest assumes, without agreeing, that hostile two-tier bids are potentially coercive.

TWO-TIER TENDER OFFERS:
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It's a pleasure to be here this afternoon to address this annual meeting of the United Shareholders Association.

As most of you know, the primary mission of the Securities and Exchange Commission is full disclosure--it's our job to make sure that the capital markets are run efficiently, fairly, and honestly. In the spirit of full disclosure, I am obliged to inform you that the speech I'm about to deliver is slightly used because about three weeks ago I delivered essentially the same address before the National Association of Manufacturers' Congress of American Industry, Government Regulation and Competition Session.

The reason I'm peddling used goods this afternoon is not that I'm running out of things to say about takeovers. Far from it, because at the pace the market is evolving and legislation is being introduced, I wonder sometimes whether

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[1]I would like to thank my legal counsel, Bernard S. Black, for his substantial assistance in the preparation of this address.

we'll ever run out of things to say. Instead, I'm delivering this speech for a second time because there is substantial value in presenting an idea before audiences with different perspectives. The NAM audience was generally opposed to takeover activity. This group is, I suspect, a bit more charitably inclined. By presenting the same ideas before two audiences with such diverse views, I hope to avoid any suggestions that I preach only to the choir, and hope also to benefit from a broad range of audience reactions.

Mythectomy

In my address this afternoon, I will attempt to perform a delicate surgical procedure that is rarely successful in Washington, D.C. The procedure is called a mythectomy. Its goal is to extract myth from a public policy debate so that decisions can be reached on the basis of reality instead of perceptions that are carefully orchestrated to support a particular result.

Those of you who have dealt with lawyers and lobbyists in this town can appreciate the difficulty of this procedure. Washington is home to a large and lucrative myth-making industry. Myth-makers are expert at nurturing perceptions that are carefully crafted to support a client's desired conclusions. Those who take issue with popular myths run a substantial risk of incurring the myth-makers' wrath. Nonetheless, there are points in public policy debates at which a myth becomes so divorced from reality that it becomes necessary to tackle it head on, if for no other purpose than to cause some Washington mythologists to think twice about what they're saying.

The subject of today's mythectomy is the two-tier tender offer, a takeover tactic that has been widely criticized as one of the raiders' most abusive devices. Two-tier tender offers have frequently been invoked as a rationale for extensive state and Federal antitakeover legislation.[2] They have also been cited as justification for aggressive antitakeover defenses.[3] In fact, the two-tier bid ranks among the most vilified of all hostile bidder techniques.

But is this reputation accurate in today's takeover market? To the surprise of many, recent data suggest that the two-tier bids may now be more of a management defensive technique than a hostile bidder tactic. Therefore, if two-tier bids are coercive or abusive, as some critics claim, then perhaps appropriate measures need to be directed at

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[2] See, e.g., CTS Corp. v. Dynamics Corp. of America, ____U.S. _____, 107 S.Ct. 1637, 1646 (1987) citing the possibility of a two-tier offer as a rationale supporting Indiana's adoption of an antitakeover statute; Cong. Rec. S7594, S7597 (June 4, 1987) (statement of Sen. Proxmire); Cong. Rec. S7667 (June 4, 1987) (statement of Sen. Sanford); National Association of Manufacturers, Protect Shareholders: Reform the Williams Act, May 1987, at 3.

[3] See, e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985), in which the court allowed an exclusionary self-tender as a defensive strategy in part because of the perceived threat posed by a two-tier tender offer. See also Note, Protecting Shareholders Against Partial and Two-Tier Takeovers: The "Poison Pill" Preferred, 97 Harv. L. Rev. 1964 (1984).

managements that use two-tier bids to defend against all-cash offers, or to mount management-sponsored leveraged buyouts, and not against hostile bidders who, in any event, appear to have largely abandoned two-tier bids as a takeover technique. In support of this proposition, recent data show that:

1. Hostile two-tier bids are now relatively rare and the incidence of such bids has been declining steadily since at least 1983;

2. When bidders resort to two-tier tender offers they are used most frequently in friendly transactions or in management sponsored leveraged buyout proposals--not in hostile bids;

3. In recent hostile takeover contests, two-tier bids have also frequently been used in management-sponsored stock repurchase programs as a defense against "one-tier" bids that offer all shareholders cash for all their shares; and

4. Corporations and shareholders can defend themselves against outsiders' two-tier tender offers by adopting fair price amendments to corporate charters. Moreover, "lollipop" plans can provide managements with an effective defense against two-tier bids, even if the corporation has no fair price provision in place.[4]

Federal and state legislation is therefore unnecessary to prevent the abuses, if any, associated with hostile two-tier bids. However, the coercion or unfairness allegedly

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[4]<u>See</u> <u>infra</u> note 16, for a description of such plans.

associated with two-tier bids continues to be present in connection with certain defensive tactics and friendly transactions. Shareholders do not have equivalent protection against management-supported defensive two-tier repurchases, which may well be more coercive than any third party two-tier bid. Therefore, if one concludes that two-tier bids are coercive, and that stockholders need to be protected against such tactics--conclusions to which I do not rush--then it follows that stockholders need to be protected against the coercion inherent in certain defensive maneuvers, management-sponsored LBOs, and friendly transactions, at least as much as they need to be protected against hostile bidder strategies that now appear to be relatively rare.

In other words, legislators who believe they have identified an evil in two-tier takeover techniques should perhaps look more carefully at certain management-sponsored maneuvers. To the extent that legislation is promoted on the rationale of protecting stockholders from coercion and abuse, it strains logic to allow managements to coerce and abuse their own stockholders by using precisely the same tactics decried if used by hostile bidders.

Before continuing with this analysis, I should note, as a caveat, that my focus today is on two-tier offers. Partial tender offers, which have both similarities to and differences from two-tier offers as used by both bidders and defending managements, are a subject for another day.

<u>The Two-Tier Offer</u>

The two-tier tender offer can be described quite simply. In a typical two-tier bid, the bidder--either friendly or hostile--offers to acquire the stock of the target company in a two step transaction. First there is a higher valued "front-end" tender offer, typically for cash, that is followed by a lower valued "back-end" offer, typically composed of securities. If enough shareholders tender into the front-end, the bidder obtains control and swaps the lower valued securities available in the back end for the remaining shares.

For example, if a company's shares trade at $50, a two-tier bidder may come along and offer $70 in cash for 51 percent of the shares and announce that he will later swap a package of securities for the remaining 49 percent. For purposes of this example, let's assume that the market estimates that the back end paper is worth $60 a share. The market will then assign a "blended value" to the bid that is equal roughly to a weighted average of the values of the front and back ends of the offer. In this example, that blended value is about $65--the average of the $70 per share in cash offered up front for half the shares and the $60 in securities offered down the road for the remaining shares. The market price, after allowing for the time value of money and the risk that the deal will collapse, will approach but not reach $65, assuming that no higher bids are expected.

Opponents of two-tier bids see them as coercive because shareholders who would prefer that the target remain independent might nonetheless tender out of fear that a majority of their colleagues will tender in the first tier, leaving the takeover opponent "squeezed out" in the lower valued second step of the transaction.[5] Opponents also claim that because individuals "do not possess the same access to information or investment skills as institutional investors, they are less likely to respond quickly and efficiently to takeover bids and are more likely to be saddled with the lower two-tier price."[6]

There is substantial cause to question whether these arguments against two-tier bids can withstand careful scrutiny because, among other reasons, available evidence suggests that the market can adequately police hostile two-tier offers and ameliorate whatever coercive effect their critics claim they

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[5]See, e.g., Lipton, Corporate Governance in the Age of Finance Corporatism, U. Pa. L. Rev. (Forthcoming, 1987) (typescript at 81) citing Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623, 630 (D. Md. 1982); Radol v. Thomas, 534 F. Supp. 1302, 1312 (S.D. Ohio 1982); Brudney & Chirelstein, Fair Shares in Corporate Mergers and Takeovers, 88 Harv. L. Rev. 297, 337 (1974); Finkelstein, Antitakeover Protection Against Two-Tier and Partial Tender Offers: The Validity of Fair Price, Mandatory Bid, and Flip-Over Provisions Under Delaware Law, 11 Sec. Reg. L.J. 291, 292-293 (1984); Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum. L. Rev. 249, 308 (1983); Note, Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison Pill" Preferred, 97 Harv. L. Rev. 1964, 1966 (1984).

[6]Lipton, supra note 6 at 81, citing Note, Second-Step Transaction in Two-Tiered Takeovers: The Case for State Regulation, 19 Ga. L. Rev. 343, 352-54 (1985).

have.[7] However, rather than argue the merits of two-tier takeovers, or explain why they might on average do more good than harm, I'll assume for purposes of this speech that two-tier bids are coercive. Now, if that's truly the case, then who is coercing stockholders in today's marketplace and where is the abuse most prevalent?

As I've already suggested, the answer may surprise you.

Two-Tier Bids Are Now Rare and Tend to be Friendly[8]

Data describing the incidence of two-tier bids are difficult to gather. Subjective assessments must sometimes be made in classifying bids as two-tier and in describing the

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[7]For example, a study by the Commission's Office of the Chief Economist ("OCE") found that the blended premium in hostile two-tier bids is not significantly different from the premium paid in all-cash offers, and that the back-end premium paid in two-tier offers also involves a substantial premium (averaging 45% for the bids studied) over the pre-offer price. Office of the Chief Economist, The Economics of Any-or-All, Partial, and Two-Tier Tender Offers (1985). Moreover, if a bidder uses a two-tier structure to try to force a target's shareholders to accept a noncompetitively low price, a competing bidder could come along with a superior all-cash offer or a superior two-tier bid. The OCE study examined four instances in which two-tier bids competed with higher-valued all-cash offers, and in every instance the all-cash bid with the higher blended premium prevailed over the two-tier bid, save for one friendly two-tier bid that was protected by the target's management through a lock-up option against a competing any-or-all bid. The OCE study found no example of a situation in which a lower-valued two-tier bid that was not protected by target management prevailed. See id. at 22-23.

[8]For a description of the source of the data and the transactions involved see Tables 1 and 2, attached.

circumstances under which such bids are made and revised.[9] Accordingly, I do not want to overemphasize the precision of the numbers I am about to cite. I invite you carefully to examine the tables presented with the text of this address and let me know if you believe that transactions have been overlooked or mischaracterized. Even if some transactions should be described differently, I doubt those reclassifications would materially change the underlying trend upon which I base my conclusions.

Data filed with the SEC suggest that two-tier tender offers reached their peak of popularity in 1982 and 1983 when there were 35 two-tier bids that accounted for about 20% of tender offers. The incidence of two-tier tender offers has, however, declined precipitously since then. In 1985 and 1986, for example, other than management-sponsored leveraged

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[9] While the classic two-tier bid is simple to describe, the boundaries of the concept are uncertain and difficulties sometimes arise in determining whether a bid is in fact a "two-tier" bid. In some cases, the bidder asserts that the back-end paper has a value equal to the front-end cash. The bidder may also obtain an investment banker's opinion to that effect. In the data presented below, such bids are treated as two-tier bids because the securities are received later than the front-end cash (and hence have a lower present value) and because the bidder has not volunteered to purchase the securities from prospective sellers for the price he claims they are worth. However, where the equally-valued back-end securities are the bidder's publicly-traded common stock and the transaction otherwise qualifies as a tax-free reorganization, tax benefits may make the second step more valuable to some target shareholders. In these bids, uncertainty about the value of the securities is also lower. The possibility of coercion or abuse, if any, may therefore be lower in such transactions, and such offers are not treated as two-tier bids.

buyouts, there were only eleven two-tier bids that accounted for about 3% of all tender offers. In addition, Commission data reveal no two-tier bids in the first five months of 1987.

The composition of the two-tier bids made during 1985 and 1986 is, moreover, quite revealing. Of these eleven bids, only three were hostile throughout the takeover battle. And all three of these bids occurred more than two years ago. Two of these bids failed when managements responded with their own two-tier defensive techniques that could be characterized as more coercive than the techniques used by the raiders. The only fully hostile two-tier bid that succeeded was in an extremely small transaction for a company valued at $7 million. And, as I've mentioned, that transaction occurred more than two years ago.

All other two-tier tender offers mounted by outsiders in the past two years were either initially supported by target management or eventually obtained management support after the bid was sweetened. Management supported these bids despite any alleged coercive effect inherent in their two-tier structure. In two of these cases, target management accepted a two-tier white knight offer to counter an all-cash hostile bid. There, management actually preferred the white knight's two-tier deal with the allegedly coercive structure over a competing all-cash non-coercive bid. Perhaps management's preference was reasonable because in both instances the two-tier bids had higher blended values than the competing all-cash bids. But, if that's the case, the same argument should be available to support hostile two-tier bids with superior blended values.

A variety of factors have led to the sharp decline in front-end loaded two-tier hostile takeover activity. These factors include: (1) the courts' willingness to allow managements greater latitude in opposing two-tier bids than in opposing all-cash offers that promise all stockholders an equal premium;[10] (2) the current availability of junk bonds and "bridge" financing as a source of financing to bidders who may not have in hand all the cash necessary to purchase 100% of a target's shares; and (3) the proliferation of fair price charter amendments and other defensive techniques that make corporations immune to two-tier bids.[11]

In sum, the data suggest that in today's market two-tier bids are relatively rare. When they do occur, they are often supported by target managements, and, as I am about to explain, one-tier bids have often been defeated by managements' own two-tier bid. Thus, the spectre of hostile two-tier bids run rampant through the marketplace appears to be a myth. Moreover, the image of embattled target managements that oppose two-tier bids because of their

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[10] See, e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985) (poison pill adoption ruled a valid exercise of business judgment in part because of threat of two-tier offers).

[11] See infra pp. 14-16.

coercive effect on stockholders may also be a myth that is shattered in part by the frequency with which managements use two-tier bids when these tactics suit managements' purpose.

Defensive Two-Tier Bids

Although fully hostile two-tier bids verge on extinction, two-tier bids are alive and well when used by managements in support of management-sponsored leveraged buyouts or by managements defending against hostile tender offers that treat all stockholders equally.

The typical situation in which management uses a two-tier front-end loaded bid in response to an outsider's non-coercive bid that offers all stockholders the same consideration, involves a self-tender for some of the target company's shares at a price above the market price expected to prevail after the repurchase offer is completed. Shareholders who tender into management's repurchase offer get the higher priced front-end of the transaction. Those who don't are left with a "stub", i.e., the lower valued stock that remains after the first tier cash is paid out.

Because stockholders who oppose the repurchase might tender simply to avoid being frozen into the lower valued second tier, these repurchases have exactly the same coercive effect as any hostile two-tier bid. Moreover, if individuals are at an informational disadvantage relative to institutional holders, any informational inequities present in two-tier hostile bids are present also in management-sponsored defensive share repurchases. Thus, defensive share repurchase programs are essentially front-end loaded two-tier tender offers proposed by management to the company's stockholders.

This technique became popular in 1985, beginning with Phillips' defense against Boone Pickens. It was also used by Unocal in its self-tender for 30% of its shares at $72 per share, while the remaining shares dropped to $28 after the offer was completed.[12] Other examples of front-end loaded two-tier self-tenders are listed in Table 2 and include: (1) Anderson Clayton's attempted defense against AC Acquisitions, which was enjoined by the Delaware court because of its coercive effect on a hostile bid that was conceded to be at a fair price; (2) Union Carbide's defense against GAF; (3) Gelco's defense against Coniston Partners; and (4) Goodyear's combination greenmail/self-tender defense against Sir James Goldsmith.

In addition, target company managements have occasionally resorted to two-tier management leveraged buyout offers in response to unwelcome bids that offer cash to all shareholders. Examples of this coercive management response include buyout offers by the managements of SCM and Fruehauf.

Indeed, of the twelve examples of two-tier defensive self-tenders or management participation LBOs described in Table 2, the nine most recent transactions, all within the last two years, involved situations in which management

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[12]Wall St. J., Apr. 24, 1985, at 5 col. 1.

proposed a two-tier transaction in response to a bid that was all-cash and offered on equal terms to all stockholders. The allegedly coercive effect of such management-sponsored techniques is especially apparent when the all-cash bid is at a price that the parties concede is fair, as in Anderson Clayton,[13] or when the target's own investment bankers concede that the outsiders' all-cash bid is more valuable than management's two-tier recapitalization proposal, as occurred in the battle for control of Gelco.[14]

It therefore appears that whatever abuse and coercion is associated with two-tier takeovers is now present primarily on the defensive side in hostile takeover battles. Critics of the takeover wars who allege unfairness because of bidder two-tier offers might therefore profitably examine current defensive tactics and ask themselves whether some of these tactics might not be more coercive than any hostile two-tier bid ever made.

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[13]AC Acquisition v. Anderson Clayton & Co., 519 A.2d 103 (Del. Ch. 1986); Wall St. J., Aug. 25, 1986, at 4 col. 2.

[14]Wall St. J., Oct. 8, 1986, at 6 col. 5. Defensive two-tier bids, unlike hostile bids, can also be combined with lock-up options (as in SCM's defense against Hanson Trust), debt with antitakeover covenants (as in CBS's defense against Ted Turner), or poison pills (as in Gelco's defense against Coniston Partners), to help ensure that the stockholders have a strong incentive to accept management's offer. Charter amendments could, in theory, provide some protection against such defensive tactics, but managements are unlikely to propose such provisions.

Non-Legislative and Non-Coercive Defenses Against Hostile Two-Tier Bids

Interestingly, a recent survey found that 158 of the Fortune 500, or 32% of the list, have adopted fair price charter amendments that essentially render the company immune to coercive hostile two-tier tender offers.[15] The widespread presence of these fair price provisions demonstrates that state or Federal antitakeover law is unnecessary as a deterrent to unwanted two-tier bids because any group of stockholders and management that wants to prevent a front-end loaded two-tier bid need only adopt an appropriate fair price provision.[16] Also, as Professor Romano of Yale Law School has recently pointed out, the net effect of state antitakeover laws that impose fair price provisions may be harmful because such laws cause corporations to become subject to fair price

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[15] V. Rosenbaum, Takeover Defenses: Profiles of the Fortune 500, Investor Responsibility Research Center (1987).

[16] Corporations that have not adopted fair-price provisions when a takeover bid is made still have substantial defenses against a two-tier bid. In many states, including Delaware, the directors, in the exercise of their business judgment and subject to solvency concerns, may issue rights to all shareholders giving them the power to sell any shares not purchased in the first-step tender offer back to the corporation at a reasonable price--so called "back-end poison pills" or "lollipops." See, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 180-81 (Del. 1986). Courts are likely to uphold as reasonable a price equal to an outside bidder's front-end tender offer price, and this defensive tactic places a substantial impediment in the path of a front-end loaded two-tier bid, even if the corporation has no fair price provision in its charter.

provisions that stockholders may not want.[17] Indeed even if stockholders do want fair price provisions, they may not want the specific provisions imposed by the statute and may well prefer provisions that individual companies can craft for themselves.[18]

Federal or state legislation restricting hostile two-tier transactions may therefore be unnecessary. In addition, if, as I would argue, the market can adequately police the potential for coercion and abuse resulting from hostile two-tier bids, the adoption of such legislation at the federal or state level would also be unwise.

Whither Legislation?

These data lead to interesting crossroads when it comes to considering the appropriate legislative response to the

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[17] Romano, The Political Economy of Takeover Statutes, 73 Va. L. Rev. 111 (1987). Stockholders might not want a fair price provision because, among other reasons: (i) they may restrict bidders' use of certain forms of consideration (e.g., part cash, part securities) in takeovers, and this loss of flexibility may lead to fewer takeovers; (ii) they may prevent a controlling stockholder from receiving more than a pro rata share of the control premium, and other stockholders may be willing to accept less than a pro rata share to induce the controlling stockholder to agree to a takeover; and (iii) stockholders may prefer a lower-valued second step to the alternative of a partial tender offer without a second step.

[18] For example, Maryland's corporation law contains a so-called "fair-price" provision that can require a second-step merger to be at a higher price than the first step. See Md. Gen. Corp. Law § 3-603. Such a provision may prevent an acquiror from making an any-or-all tender offer, or from completing a second-step merger equal in value to the first-tier, even if a majority of the stockholders would prefer such an offer or merger.

perceived coercion associated with two-tier takeovers. For example, Senator Proxmire, in a statement accompanying his recently introduced legislation, claims that two-tier tender offers "are inherently coercive in that they place enormous pressure on the stockholder to sell his shares to the raider in order to avoid a lower price in the second tier or in a subsequent freeze-out merger."[19] Senator Proxmire also stated that "tender offers themselves should be neither encouraged nor discouraged by law; egregious defenses as well as coercive takeover tactics should be limited."[20]

Well, if a two-tier bid is "inherently coercive," a two-tier repurchase has precisely the same inherently coercive effect. The Proxmire legislation, however, does nothing to address the coercion inherent in these defensive techniques. Why is that? Is it an oversight? Is it because, for some reason I fail to understand, a management-supported two-tier self-tender is non-coercive, even if it is in response to an all-cash offer, whereas a hostile bid on exactly the same terms and conditions is invariably coercive? Or is it because the goal of some legislation is to shut down as much takeover activity as possible? If so, stockholder coercion may serve primarily as a convenient rationale for antitakeover

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[19]Cong. Rec. S7594, S7597 (June 4, 1987) (statement of Sen. Proxmire).

[20]Id. at S7596.

legislation, provided that the rationale is not applied with equal vigor to defensive techniques.

Conclusion

Hostile takeovers raise many serious and legitimate concerns regarding corporate governance and the competitiveness of our economy. The spectre of widespread front-end loaded two-tier hostile takeovers is not, however, such a concern. As I've explained, hostile two-tier takeovers are quite rare and, even if they became common, the corporate chartering mechanism, combined with recent court decisions and the availability of "lollipop" plans, would be able to control the potential for coercion. Thus, federal or state legislation to address hostile two-tier offers is unnecessary.

Ironically, however, the front-end loaded two-tier technique has been embraced by managers who oppose takeovers. Recently introduced takeover legislation that is highly critical of two-tier techniques when used by bidders is, however, silent with regard to the same techniques when used by defending managements. The debate over coercive or abusive two-tier techniques has thus come full circle: some managements defending against hostile bids that treat all shareholders equally now find themselves using two-tier tactics that they vilify when used by raiders. Therefore, those who sincerely fear the coercion and abuse allegedly inherent in two-tier tender offers might want to scrutinize certain management defensive tactics more carefully than the tactics used by bidders mounting recent takeover attempts.

TABLE 1

Two-Tier Bids by Third Parties
Excluding Management-Participation LBO's

January 1985 - May 1987

Bidder	Target	Date Offer Commenced	Transaction Type (H = Hostile) (F = Friendly) (W = White Knight) Initial	Final	Offer Completed?
Successful					
Johnson Controls	Hoover Universal	3/4/85	F	F	Yes
Lexicon	Scope	5/15/85	H	H	Yes[1]
Allied Corp.	Signal Cos.	5/17/85	F	F	Yes
Minstar	AMF	6/18/85	H	F	Yes[2]
Occidental Petroleum	Midcon Co.	1/7/86	F, W	F	Yes[3]
Burroughs	Sperry Corp.	5/8/86	H	F	Yes[4]
May Dept. Stores	Associated Dry Goods	6/26/86	H	F	Yes, As One-Tier Transaction
Reuters	Instinet	11/13/86	F	F	Yes
Data Switch	T-Bar	11/26/86	F, W	F	Yes[6]
Unsuccessful					
Icahn	Phillips Petroleum	2/13/85	H	H	No[7]
Mesa Partners II	Unocal	4/8/85	H	H	No[8]

Source: Data gathered by Directorate of Economic & Policy Analysis from Schedule 14D-1 filings, supplemented by Office of Commissioner Grundfest.

Footnotes to Table 1

1/Lexicon completed its offer after Scope unsuccessfully solicited white knight offers and LBO financing. The total market value of the target was approximately $7 million based on the per share price offered by the bidder. See Wall St. J., May 24, 1985, at 4 col. 3; Wall St. J., June 13, 1985, at 25 col. 5; Wall St. J., July 3, 1985, at 4 col. 1.

2/AMF agreed to a merger after Minstar increased its bid in response to a white knight offer. See Wall St. J., June 17, 1985, at 10 col. 20.

3/Occidental's white knight bid defeated an all-cash hostile bid by Wagner & Brown and Freeport-McMoran. See Offer to Purchase of OPCO Acquisition Corp. dated January 7, 1986.

4/Sperry agreed to a merger following an increase in Burrough's bid. See Wall St. J., May 28, 1986, at 2 col. 2.

5/The parties ultimately agreed on a friendly stock-for-stock merger, an option presented by the bidder to the target at the time of the hostile offer. See Wall St. J., July 17, 1986, at 2 col. 2.

6/Data Switch's white knight bid was in response to an all-cash hostile bid by John Beall and Co. See Wall St. J., Dec. 23, 1986, at 10 col. 3.

7/Icahn's bid was a response to Phillips' two-tier defense against Pickens, in which Phillips repurchased Pickens' shares, and Phillips and a Phillips employee stock ownership plan proposed to purchase a substantial percentage of the outstanding Phillips shares. Phillips improved its offer and Icahn withdrew his bid. See Wall St. J., Feb. 6, 1985, at 2 col. 2.

8/Unocal responded to Mesa Partners' bid with a self-tender that involved far more extreme two-tier pricing than the Mesa Partners' bid. Unocal offered $72 in cash for approximately 30% of its stock in its self-tender; Unocal's stock dropped to $28 after the offer. Pickens had offered $54 in cash up front and securities that he valued at $54 on the back end. See Wall St. J., April 24, 1985, at 5 col. 1.

TABLE 2

Examples of
Defensive Self-Tenders
and Management-Participation LBO's
that Operate as Two-Tier Offers

January 1985 - May 1987

Target	Hostile Bidder	Hostile Bid Type (O = One-Tier) (T = Two-Tier) (C = All Cash)	Date Offer Commenced	Defensive Transaction or LBO Completed?
Phillips Petroleum	Mesa Petroleum and Wagner & Brown	n.a.	12/24/84	Yes[1]
Unocal	Mesa Partners II	T	4/17/85	Yes[2]
CBS	Ted Turner	O	7/30/85	Yes[3]
SCM	Hanson Trust	O, C	9/16/85	No[4]
Union Carbide	GAF Corp.	O, C	12/16/85	Yes[5]
Fruehauf	Asher Edelman	O, C	6/27/86	No[6]
Anderson Clayton	AC Acquisitions	O, C	8/22/86	No[7]
Gelco	Coniston Partners	O, C	9/26/86	Yes[8]
Lucky Stores	Asher Edelman	O, C	10/13/86	Yes[9]
Goodyear	Sir James Goldsmith	O, C	11/6/86	Yes[10]
Gencorp	AFG Industries and Wagner & Brown	O, C	4/6/87	Pending[11]
Burlington Industries	Asher Edelman and Dominion Textiles	O, C	5/12/87	Pending Now As One-Tier Transaction

Source: Data gathered by Office of the Chief Economist and staff of Commissioner Grundfest's office.

Footnotes to Table 2

1/Phillips Petroleum repurchased approximately 6% of its outstanding shares from Mesa Petroleum and Wagner & Brown (who had threatened a control contest but had not made a definite offer) at $53 per share and also repurchased an additional 50% of its outstanding shares from other shareholders for $62 face amount of debt securities per share. Mesa's hostile bid is not characterized because it is not clear from press reports whether it would have been two-tier, had a decision to start a tender offer been made. See Wall St. J., March 5, 1985, at 3 col. 1; Wall St. J., March 7, 1985, at 10 col. 1.

2/Unocal repurchased approximately 30% of its shares at $72 per share in response to a $54 per share bid by Mesa Partners II; after the offer was completed, the remaining shares traded in the market at approximately $28 per share. See Wall St. J., April 26, 1985, at 6 col. 1.

3/CBS repurchased approximately 20% of its outstanding shares for $150 per share; CBS stock traded in the market after the repurchase was announced at $115 per share. See Wall St. J., July 31, 1985, at 2 col. 2.

4/SCM management invested in a shell company formed by Merrill Lynch to complete a leveraged buyout in response to Hanson Trust's all-cash hostile bid. See Wall St. J., Sept. 12, 1985, at 3 col. 1. Hanson Trust eventually acquired SCM.

5/Union Carbide repurchased approximately 35% of its outstanding shares for $85 per share in response to a $74 per share all-cash bid by GAF Corp. See Wall St. J., Dec. 16, 1985, at 3 col. 1.

6/Fruehauf management invested in a shell company formed by Merrill Lynch to complete a defensive leveraged buyout in response to an Asher Edelman's all-cash hostile bid. After a counterbid by Edelman, Fruehauf agreed to a one-tier leveraged buyout. See Wall St. J., June 26, 1986, at 2 col. 2.

7/Anderson Clayton offered to repurchase approximately 66% of its outstanding shares for $60 per share in response to an all-cash bid of $56 per share by AC Acquisitions. The self-tender was enjoined by the Delaware Chancery Court. See AC Acquisitions v. Anderson Clayton & Co., 519 A.2d 103 (Del. Ch. 1986); Wall St. J., Aug. 25, 1986, at 4 col. 2.

8/Gelco repurchased approximately 23% of its outstanding shares at a price for $16 in cash plus securities that it valued at $16-$20 per share in response to a $26 per share all-cash bid by Coniston Partners. See Wall St. J., Oct. 8, 1986, at 6 col. 5.

9/Lucky Stores repurchased approximately 27% of its outstanding shares at $40 per share in response to $37 per share acquisition proposal by Asher Edelman. See Wall St. J., Dec. 23, 1986, at 8 col. 2.

10/Goodyear repurchased approximately 11% of its outstanding shares from Sir James Goldsmith at $50 per share and purchased an additional 37% of its outstanding shares through a self-tender at $50 per share. After announcement of the self-tender, Goodyear shares traded in the market at approximately $43 per share. See Wall St. J., Nov. 21, 1986 at 3 col. 1.

11/Gencorp expects to repurchase approximately 54% of its outstanding shares at $130 per share in response to an all-cash $100 per share offer by Wagner & Brown and AFG Industries. See Wall St. J., April 8, 1987, at 17 col. 2.

12/Burlington Textiles announced a repurchase of approximately 30% of its outstanding shares at $80 per share in response to an all-cash $67 per share bid by Asher Edelman. See Wall St. J., May 12, 1987, at col. 2. After Edelman increased his bid, Burlington proposed a one-tier leveraged buyout, which is pending.