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THE SEC'S 1986 TENDER OFFER AGENDA

Remarks to

Maryland State Bar Association
Section of Corporation, Banking and Business Law

The Hyatt Regency
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I. Introduction

I would like to review for you today the SEC's current response to the boom in takeover activity -- a phenomenon Business Week has labeled "big money's speculative ploy of choice at the

moment." 1/ This is a particularly appropriate time for such a review. On January 9, the Commission, at its full, five-person membership for the first time in nine months, met publicly to consider a wide array of takeover regulatory issues. In at least one respect, the Commission's response was novel -- as I will describe in a minute, it raised the possibility of an entirely new direction in federal tender offer regulation: shareholder self-determination.

II. The Policy Debate

A. The Takeover Phenomenon

Before I describe the Commission's recent meeting, I would like to start with a bit of a background. In 1968, when the Williams Act was enacted, tender offers were a rare and somewhat unsavory occurrence. Since that time, they have become a well-accepted, almost common-place, feature of our financial markets. Just since 1980, the dollar volume of tender offers has increased five-fold, to over $52 billion in fiscal 1985.

As tender offers have become more common, the debate concerning their merits has become more intense. Some argue that the hostile takeover is crippling corporate America by forcing corporations to manage for the short-run. These critics contend that management is compelled to sacrifice long-term earnings, and to saddle the

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1/ Bianco, The Casino Society: Playing With Fire, Bus. Wk., Sept. 16, 1985, at 81.

company with dangerous levels of debt, in order to keep share prices high and thus unattractive to corporate raiders. Others, however, contend that tender offers are good for the economy. They argue that takeovers impose marketplace discipline on management and reallocate assets from less to more productive uses.

While the merits of takeovers are still being debated, one thing is clear -- they have offered a bonanza to shareholders. A study conducted by the Commission's Office of the Chief Economist revealed that target shareholders enjoy, on an average, a 47 percent premium over market prices when their company is the object of a takeover. 2/ The same study shows that even the bidder's shareholders receive a small, but measureable, benefit -- about 4 percent on average. That 47 percent premium to target shareholders equals roughly $39 billion, just in the five years 1981-1985. And, although somewhat lower in amount, the average shareholder still reaps a very substantial gain over prior market price when his company is the object of the much-criticized two-tier, front-end loaded, tender offer; even partial bids produce substantial net gains to shareholders. 3/

2/ SEC Office of the Chief Economist, "Any-or-all, Partial and Two-tier Tender Offers" (1985).

3/ Id.

B. Commission Perspective

From what perspective does the SEC view this activity? Since 1968, the Commission has regulated tender offers under the Williams Act. I see the Williams Act as embodying a two-pronged philosophy. First, the Act seeks to protect shareholders -- and in this context that means primarily target company shareholders. The Act protects them through disclosure provisions which require that information be disseminated concerning a tender offer when one is made, and concerning those who acquire more than five percent of an issuer's securities. In addition, the Williams Act contains substantive provisions designed to ensure that shareholders have a fair opportunity to participate in a takeover. Major examples of these are proration and withdrawal rights. 4/

The second prong of the Williams Act philosophy is neutrality; the Act seeks to accomplish the shareholder protection objectives I just mentioned without unduly favoring either target or bidder. 5/ For that reason, the Commission has traditionally resisted proposals

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4/ Securities Exchange Act, Section 14(d)(5) and 14(d)(6).

5/ Takeover Bids: Hearings on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance on the House Comm. on Interstate and Foreign Commerce, 90th Cong. 2d Sess. 4, 47-48 (1968); Senate Hearings at 17, 19, 25, 182. See Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1279-80 (5th Cir. 1978), rev'd on other grounds sub nom. Leroy v. Great Western United Corp., 443 U.S. 173 (1979).

to engraft on federal securities law tender offer regulation requirements designed to advance or retard takeovers for reasons unrelated to shareholder protection. 6/

III. Recent Developments

Over the last several years, as the velocity of takeover activity has increased, one lesson about takeover regulation has become evident. Regulating tender offers is a little like regulating water under high pressure. The harder you squeeze, the more likely the water will find a way around whatever barriers are placed in its path. For that reason, by-and-large, the marketplace, rather than the SEC, seems to be the most effective regulator of tender offers.

This is not to say that the Commission should or can abdicate its responsibility to enforce the Williams Act. In my view, several recent developments in the highly sophisticated and aggressive takeover market seem to be eroding both the shareholder full disclosure/fair treatment and the neutrality objectives of the Williams Act. These four problem areas are unconventional tender offers; discriminatory offers; timing problems with respect to Schedule 13D disclosure; and pre-emptive corporate anti-takeover defenses.

6/ For example, the Commission has opposed legislation to incorporate a "community impact" disclosure requirement into Section 13(d).

A. Unconventional Tender Offers

Let me start with the unconventional tender offer. It might come as a surprise to anyone first learning about the field of tender offer regulation that the key term -- tender offer -- is undefined in the Williams Act. The Commission has, however, always taken the position that any transaction with the same effects and consequences as a formal tender offer is itself a tender offer and must comply with the regulatory requirements governing tender offers. In Wellman v. Dickinson 7/ the Commission

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7/ 475 F. Supp. 783 (S.D.N.Y. 1979), aff'd on other grounds, 682 F. 2d 355 (2d Cir. 1982), cert. denied, 460 U.S. 1069 (1983). Those factors include:

(1) an active and widespread solicitation for shares of an issuer;

(2) a solicitation for a substantial percentage of the issuer's stock;

(3) an offer to purchase at a premium over the prevailing market price;

(4) terms of the offer that are firm rather than negotiable;

(5) an offer contingent on the tender of a fixed minimum number of shares and often subject to a ceiling of a fixed maximum number of shares to be purchased;

(6) an offer open for only a limited period of time;

(7) pressure on offerees to sell their stock; and

(8) public announcements of an acquisition program that precede or accompany the accumulation of stock.

formulate an eight factor test for identifying transactions which are, in effect, tender offers. These factors boil down to one thing -- are shareholders pressured to sell their shares to an offeror in the same manner as they would be in a tender offer? If so, tender offer regulation applies. Two recent cases have, however, rejected the Commission's position in this regard, and lead some to suggest that an acquiror's compliance with the Williams Act may, as a practical matter, be voluntary.

1. SEC v. Carter Hawley Hale Stores, Inc. (C.A. 9, 1985) 8/

a. Facts.

The first of these cases is SEC v. Carter Hawley Hale Stores, Inc. It arose when The Limited commenced a hostile tender offer for 55.5 percent of Carter Hawley's shares, at $30 per share. Carter Hawley responded with a wide array of defenses, including the transfer of significant voting power to an ally, General Cinema. Carter Hawley also granted General Cinema a "crown jewel option" -- the right to purchase Carter Hawley's Walden Books Division. The net effect of these moves was to virtually assure the failure of The Limited's bid. Then, in the face of a market almost certain to decline, Carter Hawley announced that it would repurchase up to 15 million of its own shares in open market and privately negotiated transactions. This announcement was akin to

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8/ 760 F.2d 945 (9th Cir. 1985).

shouting "fire" in a theatre with only one exit. In six frenzied trading days, Carter Hawley purchased about 17.9 million shares, 50.3 percent of its outstanding common shares, at an average price of $26.20. As soon as Carter Hawley stopped its purchases, the price plummeted to about $20.

b. Commission Position.

The Commission commenced an injunctive action alleging that Carter Hawley's repurchase program constituted a tender offer and that the offer was unlawful, since it failed to comply with the Commission's rules. In particular, the Commission's rules require that self-tenders remain open for at least fifteen business days and that the offer, if oversubscribed, be prorated among those shareholders who tender within the first ten business days. 9/ Carter Hawley extended its sellers none of these rights. The Commission argued that shareholders were pressured to sell just as if there had been a formal tender offer.

c. Holding.

Both the district court and the Ninth Circuit rejected the Commission's position and held that Carter Hawley's purchases were not subject to tender offer regulation. Although the court of appeals accepted the validity of the eight factor test for

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9/ Rule 13e-4(f), 17 C.F.R. 240.13e-4(f).

identifying an unconventional tender offer, it held that Carter Hawley's purchases did not meet that test.

2. Hanson Trust PLC v. SCM Corp. (C.A. 2, 1985) 10/

The second troublesome, recent unconventional tender offer case involved a third-party bid -- Hanson Trust's acquisition of SCM.

a. Facts.

On August 21, 1985, Hanson Trust PLC announced a cash tender offer for all outstanding shares of SCM, an office products manufacturer, at $60 per share. Hanson's Schedule 14D, in standard boilerplate, reserved the right to withdraw the offer and make further open market purchases. Nine days later, SCM and Merrill Lynch Capital Markets announced a leveraged buyout agreement to acquire SCM at $70 per share. Hanson responded by increasing its offer to $72 per share. SCM and Merrill Lynch then raised their offer to $74 per share, and SCM granted Merrill Lynch the option to purchase certain SCM assets in the event any other person acquired over 33 percent of SCM's shares. 11/

10/ Hanson Trust PLC v. SCM Corp., 774 F.2d 47 (2d Cir. 1985).

11/ The Second Circuit subsequently invalidated the lock-up option, Hanson Trust PLC v. SCM Corp., Nos. 85-7951, 7953 (2d Cir. Jan. 6, 1986).

The same day, at 12:58 p.m., Hanson publicly announced termination of its offer. A few hours later, however, Hanson began acquiring SCM's shares in the open market. Within an hour and a half, Hanson had purchased approximately 25 percent of SCM's common stock, all at $73.50 per share, primarily from arbitrageurs. SCM thereupon obtained a preliminary injunction prohibiting Hanson from acquiring additional shares, and SCM appealed.

b. Holding.

In the Second Circuit, the Commission, as amicus curiae, argued that the preliminary injunction should be upheld because triable, factual issues existed as to whether Hanson's purchases constituted an unconventional tender offer or a de facto continuation of Hanson's earlier tender offer. The Second Circuit rejected these arguments. 12/ The court stated that whether a solicitation constitutes a tender offer turns on whether the solicitees need the protections of the Williams Act. 13/ Noting

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12/ The court did not reach the Commission's other arguments, including an argument that the withdrawal of the tender offer and subsequent large open-market purchases denied SCM's thousands of small shareholders the protections of the Williams Act, including the right to best price and proration.

13/ Indeed, the court analogized to SEC v. Ralston-Purina, the 1953 Supreme Court decision holding that the private placement exemption from Securities Act registration applies only where the offerees are sophisticated and able to fend for themselves. SEC v. Ralston Purina Co., 346 U.S. 119 (1953).

that Hanson purchased primarily from arbitrageurs and other large investors, the court concluded that the protections of the Williams Act were unnecessary in this instance.

3. Consequences.

Some observers have argued that the Second Circuit's decision eviscerates Commission enforcement of the Williams Act and that bidders can now simply announce their intent to acquire control of a target company, wait for arbitrageurs to accumulate large blocks, and then acquire those blocks in the open market, all without extending Williams Act protections to shareholders. The Wall Street Journal, in an editorial entitled "A Happy Jig," applauded this development, calling the new tactic "the Williams Act two-step." 14/ In contrast, Business Week has editorially deplored the result in Hanson and called for legislation to extend the Williams Act to open-market purchase campaigns. 15/

B. Discriminatory Offers

The second tender offer regulation problem area is that of discriminatory or exclusionary offers. The Commission has long taken the position that a tender offer must be open to all

14/ "A Happy Jig," Wall St. J., Oct. 7, 1985, at 22.

15/ Giving Shareholders a Fair Shake, Bus. Wk., Oct. 14, 1985, at 170.

shareholders and that all must receive the best price offered to any. This concept of equal treatment is, in the Commission's view, fundamental to the Williams Act.

Again, however, a recent case raises questions concerning the effectiveness of this equal treatment notion. The issue arose from T. Boone Picken's effort (through Mesa Petroleum) to acquire Unocal. Mesa made a tender offer for Unocal, and Unocal, like Carter Hawley and SCM, engaged in defensive manuevers. Unocal management, however, came up with a new tactic: It made an issuer self-tender offer, offering to exchange Unocal common shares for an attractive package of Unocal debt securities. The catch was that the Unocal offer was open to all Unocal shareholders, except those affiliated with Mesa. The effect of this ploy, if both Mesa and Unocal persisted in their offers, would be to cause Mesa to be the largest, perhaps the sole, shareholder of a debt-ridden company -- not a very attractive prospect for Mesa. Mesa filed suit challenging this offer, but a federal district court in California held that the Williams Act did not prevent Unocal from making a tender offer which excluded one shareholder from participating. 16/ Subsequently, the Delaware Supreme Court held that the business judgment rule protected the decision of the Unocal directors to mount this defense. 17/

16/ Unocal Corp. v. Pickens, 608 F. Supp. 1081 (C.D. Cal. 1985).

17/ Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

The federal court's Unocal decision could open the door to a wide range of discriminatory offers. One possibility might be a variation on the "Williams Act two-step." An acquiror might publicly announce that he was interested in seeking control of a particular company. Inevitably, trading would become active, and shares would tend to concentrate in the hands of arbitraguers. The acquiror could then make a tender offer open only to holders of, say, one percent or more of the company's stock. In this way, control could be acquired from institutional holders -- perhaps at a price more attractive to the bidder than would be necessary to effect a tender offer open to all shareholders -- and any public stockholder who failed to sell to the arbitraguers would be left out. I doubt that the framers of the Williams Act thought that they were permitting such a result.

C. Schedule 13D Disclosure

The third problem area involves Schedule 13D. Section 13(d) of the Securities Exchange Act provides that anyone who acquires more than 5 percent of a class of equity securities of a public company must, within ten days, file a Schedule 13D with the Commission identifying himself and describing the intent of his purchases. Thereafter, any material changes must be "promptly" disclosed to the market. Recently, two timing problems have become evident in the 13D area.

The first is the so-called Section 13D window. As I mentioned a moment ago, the initial Schedule 13D need not be filed until

ten days after the 5 percent acquisition. During that ten day period, one is free to make whatever further acquisitions one desires, without any disclosure to the market. There have been cases in which buyers have made substantial acquisitions during that window period, ranging up to 20 percent or more of the issuer's outstanding securities. The effect has been to deprive the market, the target company, and shareholders of the sort of information that the Williams Act contemplates during the time when important market activity is taking place.

The second problem relates to the prompt amendment requirement. It is illustrated by a recent Commission administrative proceeding, In re Cooper Laboratories, filed and settled on June 26, 1985. 18/ Cooper Laboratories had acquired 11.1 percent of Frigitronics' outstanding common stock as of August 9, 1984, at prices ranging from $22 to $24.25 per share. On August 20, 1984, Cooper and its affiliate, Cooper Vision, Inc., filed a Schedule 13D, disclosing their acquisition of the stock and stating that they might acquire additional shares "by tender with a view of gaining control."

Predictably, following the filing of Cooper's Schedule 13D, the price of Frigitronics' stock shot up, in anticipation that Cooper would launch a tender offer for the company. However, on August 29th, Cooper quitely began to sell its Frigitronics' holdings. By September 6th, it had sold over 1 percent of

18/ In re Cooper Laboratories, Inc., Securities Exchange Act Release No. 22171 (June 26, 1985).

Frigitronics's outstanding shares, and, between September 6th and 12th, Cooper proceeded to liquidate its entire interest in Frigitronics. On September 13th, the day after it had completed its sales, Cooper filed an amended Schedule 13D.

In its order, the Commission alleged that, given that Cooper had mentioned the possibility of a tender offer and that Cooper had begun its sale of Frigitronics's stock on August 29th, the filing on September 13th of the amended Schedule 13D was not filed "promptly" as the Commission's rules require. 19/ Cooper Laboratories consented to the entry of an order finding violations, without admitting or denying the allegations in the Commission's order.

D. Defensive Tactics

The fourth problem area is the rise of defenses adopted, not in response to a particular takeover, but to preclude or discourage any hostile bid for the company. Largely, of course, the terms and validity of this type of takeover defense lies outside of the SEC's jurisdiction; these are matters of state law.

19/ Under the Commission's Rule 13d-2, 17 C.F.R. 240.13d-2, a Schedule 13D must be amended "promptly" to reflect any material changes, including, specifically, "any material increase or decrease in the percentage of the class beneficially owned."

1. Charter and bylaw amendments

You are all probably familiar with the litany of charter and bylaw amendments which many companies have adopted in order to discourage or inhibit hostile takeovers. These include requirements for super-majority approval of various types of corporate transactions incident to a takeover or merger; fair price amendments, designed to insure that all shareholders are bought-out at the same price; staggered director terms, intended to slow the rate at which a large holder can exert control; recapitalizations into voting and non-voting classes of stock, in order to concentrate voting control in different hands than equity ownership generally; and a wide range of other devices.

As I said a moment ago, the adoption of such defenses is largely outside of the Commission's jurisdiction. However, these types of defenses do generally require shareholder approval and that, in turn, requires the use of the proxy process regulated by the Commission. 20/ The Commission has, for the last several years, required explicit disclosure of the anti-takeover purpose and effects of such amendments. 21/ In addition, the Commission may be required to decide whether the elimination of the one-share,

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20/ Securities Exchange Act Section 14(a) authorizes the Commission to regulate the solicitation of proxies.

21/ Securities Exchange Act Rel. No. 15230 (Oct. 13, 1978).

one-vote principle with respect to common stock is consistent with the principles underlying the Securities Exchange Act. The New York Stock Exchange is currently considering whether to eliminate or modify its one-share, one-vote listing requirement. If it chooses to make any alteration in this regard, Commission action will be necessary, since exchanges may not amend their rules, except with Commission approval. 22/

2. Poison pills

A new, more potent, type of takeover defense has been developed recently -- the poison pill. A poison pill differs from the other defenses in an important way -- it is typically issued without shareholder approval. Shareholders can have the pill prescribed to them by the board of directors, whether they want the medicine or not.

Poison pills typically consist of rights or warrants that are distributed as dividends to shareholders and, at least initially, trade with the company's common shares. At the issuance stage, these rights have little or no value, and can be redeemed by the board for a nominal consideration. In the event, however, that a "triggering event" occurs -- for example, the acquisition by any party of more than 20 percent of the issuer's stock or a hostile tender offer for 30 percent or more -- these rights detach from

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22/ See Securities Exchange Act Section 19(b).

the common stock and trade separately. Once a specified percentage of the issuer's stock is actually acquired, the rights typically may no longer be redeemed. Even at this stage, however, the rights themselves have little intrinsic value. However, if the issuing company subsequently becomes the object of a merger, the poisonous nature of the pill reveals itself. In that event, the warrants give their holders the right to acquire something -- typically the shares of the surviving corporation -- at an extremely low price. Household International's warrants, for example, which were recently the subject of litigation in Delaware, give the holder the right to acquire $200 worth of the shares of the surviving company, for $100.

Poison pill warrants are intended to make the target company prohibitively expensive to acquire on an unfriendly basis. In Household's case, the effect, if all outstanding poison pill warrants were exercised, would be to add $4 billion to Household's purchase price. Thus, a company like Household, with $2 billion market value, could only be acquired for $6 billion. About 30 companies have adopted poison pills, including Colgate Palmolive, Crown Zellerbach, Dart & Kraft, General Host, McDonald's, Owens-Illinois, RCA, and Revlon. However, poison pills did not prevent Sir James Goldsmith from taking over Crown Zellerbach or Pantry Pride from taking over Revlon. Thus, they are not infallible.

As I mentioned a moment ago, the validity of the issuance of poison pill warrants, without shareholder approval and without a

specific takeover on the horizon, was recently upheld by the Delaware Supreme Court in Moran v. Household International, Inc. 23/ The Commission filed an amicus brief, arguing that the Household poison pill was a de facto defense against any hostile bid, not merely against a two-tier offer, as Household contended. The Commission also argued that precluding shareholders from the opportunity to consider a bid was contrary to the spirit of the Williams Act. The court disagreed with the Commission's views, and, in light of the Delaware Court's decision, many have predicted that the adoption of poison pills will become widespread.

IV. The SEC's 1986 Agenda

Having outlined the problem areas, let me now describe how the Commission has proposed to deal with them. As I mentioned at the outset, the Commission met publicly on January 9 to review the full panoply of tender offer issues. I want to stress that this description, and my comments concerning the Commission's actions, reflect purely my own views, based on discussion at the Commission's public meeting. One or more Commission releases describing these matters will soon appear; only those documents will, of course, formally state the Commission's position.

23/ [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,371 (Del. S. Ct. Nov. 19, 1985).

A. <u>Unconventional Tender Offers</u>

With respect to unconventional tender offers, the Commission directed the staff to prepare a "concept release" inviting public comment on the idea of requiring that any acquisition of a substantial percentage (perhaps 10 percent) of a company's securities must be made by tender offer, if there has been a tender offer for the target shares previously (within, perhaps, the prior two days) or if there is a competing tender offer pending. This idea addresses the fact that, once a company is identified as a tender offer target, open market purchases may have the same affect as a tender offer: Shares will have already been driven into the hands of arbitrageurs. Shareholders may feel that, unless they sell into the market or into the acquiror's offer, they will loose a necessarily fleeting opportunity. In addition, this idea responds to the alleged unfairness of permitting an open market's acquiror purchase program, unregulated by the Williams Act, to compete with a regulated, Williams Act tender offer.

This proposal would address both the Carter Hawley Hale and SCM situations on their facts. As I mentioned a moment ago, Carter Hawley's open market purchases were in competition with The Limited's then-pending tender offer. In SCM, Hanson's bid would

have fallen under both prongs of the rule -- it was made in competition with Merrill Lynch's pending tender offer (incident to a proposed management leverage buy out of SCM) and it occurred within a very brief period after the withdrawal of a prior tender offer -- Hanson's own bid.

In addition to directing the staff to prepare this concept release, the Commission also instructed the staff to meet with each Commissioner and determine whether there is a sufficient consensus on a definition of the term "tender offer" to warrant another attempt to codity the term. One prior suggestion, published by the Commission in 1979, would have made any offer published or mailed to all shareholders a tender offer <u>and</u> one or more offers to acquire over 5 percent of a single class of a company's securities; directed to more than ten people; during any 45 day period; a tender offer. 24/ This and other possibilities may be further explored in the attempt to determine whether any consensus can be reached on a tender offer definition.

B. <u>Discriminatory Offers</u>

The second problem area -- discriminatory offers -- was the subject of two Commission rule proposals last July. 25/ At that

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24/ Securities Act Rel. No. 6159 (Nov. 29, 1979).

25/ Securities Exchange Act Rel. No. 22198 (July 1, 1985); Securities Exchange Act Rel. No. 22199 (July 1, 1985).

time, the Commission proposed a so-called "all-holders" rule for both third party and issuer tender offers. In the third party area, proposed Rule 14d-10 would require that the offer be open to all holders of the target company's securities.

At its meeting last Thursday, the Commission decided to repropose for comment a companion rule -- the "best price" rule. 26/ That rule would require that all security holders receive the best price paid to any security holder. Since the all-holders

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26/ The Commission approved publication of a release proposing that the previously proposed "best-price" rule be revised to provide:

- that all holder must be paid the highest consideration paid (as opposed to offered) to any security holder. The proposed amendment responds to concerns that bidders be permitted to reduce their bids in response to target company actions that reduce the value of the target's shares, or for other reasons, so long as shareholders are assured adequate notice and opportunity to act on the revised bid;

- that upon announcement of a decrease in the consideration offered or securities sought, withdrawal rights must be extended throughout the offer (but not reopened upon commencement of a competing bid), or in an alternative proposal, for an additional ten business days;

- that a tender offer must remain open for at least ten business days upon announcement of an increase or decrease in the percentage of securities sought. The Commission concluded that such a change is economically comparable to a change in the consideration offered, and that shareholders should be provided the same time to respond to such amended offers.

rule and best price rules complement one another, final action on the "all holders" proposals for third-party and issuer tender offers was deferred until the Commission considers adoption of the revised "best price" rule.

When the Commission does consider adoption of the all-holders rule, there will be two key issues. The first is authority. The comments have questioned the Commission's authority to adopt the all-holders rule. The staff believes, however, that an all-holders requirement is inherent in the Williams Act and thus within the scope of the Commission's general rulemaking authority. The second, and less noticed, issue will be the effect which such a rule would have on state antitakeover statutes. A few states have statutes which require that, before an offer can be made to residents of that state, a disclosure filing must be made with state officials. Minnesota is perhaps the best example, since this portion of its statute has been upheld against constitutional challenge by the Eighth Circuit. 27/

The relationship between such statutes -- which only purport to regulate the offer to the extent it is made within that state and to state residents -- and the all-holders rule is unclear. Must the bidder attempt to comply with these statutes? What if he is unable or unwilling to do so? Should the Commission create

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27/ See Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 917 (8th Cir. 1984).

an exception to the all-holders rule for offers in such states, in order that the bidder will not be compelled by federal law to violate a state law, if unable to comply to the satisfaction of state authorities? Would an effect of the all-holders rule be to render these statutes unconstitutional under the Supremacy Clause?

C. Schedule 13D

In the area of Schedule 13D disclosure, the Commission decided at the January 9 open meeting to recommend legislation changing the current 10-day window period to two days. That is, if the Commission's proposal is enacted by Congress, anyone acquiring more than 5 percent of an issuer's securities will be required to file a Schedule 13D within two calendar days thereafter. At the same time, however, the Commission withdrew it endorsement of a prior legislative proposal which would have also empowered the Commission to create a "standstill" on further purchases for up to two days, until the market had had an opportunity to assimilate the content of the Schedule 13D.

D. Defensive Tactics

The Commission also considered a wide variety of defensive tactics and determined that further federal regulation of them was unnecessary at this time. In one area, however, it did direct further study.

The Commission instructed the staff to prepare a concept release exploring whether legislation or regulation of poison pills is appropriate. One possibility mentioned at the meeting was whether a shareholder vote should be required before the adoption of a poison pill. Of course, a federal requirement of a shareholder vote in order to make this type of change in the company's capital structure would be a significant alteration in the existing relationship between federal law and state corporation law. Accordingly, the Commission prudently decided to examine the area through the comment release process, before determining whether to formulate any proposal.

E. Shareholder Opt-Out

I mentioned at the outset that the Commission did something novel at its January 9 public meeting. I want to conclude by mentioning that novel facet of the Commission's recent review of tender offer regulation.

The Commission directed the staff to prepare a concept release raising the issue of the possible reliance on corporate self-governance mechanisms as a means of introducing greater flexibility into takeover regulation. In particular, the release is to explore the merits and drawbacks of (a) permitting an exclusion from the pending all-holders rule for corporations whose stockholders vote to amend their charters so as to provide

for such an exclusion, and (b) permitting corporations to modify other provisions of takeover regulations in accordance with shareholder-approved resolutions.

Whether shareholders should be able, by charter amendment, to waive the application of Commission tender offer rules under the Williams Act to a tender offer for the shares of their company is a novel and far-reaching issue. As I mentioned, the specific focus of the proposal was the possibility of shareholders "opting out" of the all-holders requirement for issuer tender offers. The effect of doing so would be to permit the company to mount a Unocal-type defense, to repell an unwanted tender offer. Presumably, the adoption of such a charter amendment would discourage tender offers, since potential bidders would know that there was a potent defense which might be directed against them.

Other opt-outs might, however, <u>encourage</u> offers. For example, the idea might be extended to permit shareholders to opt-out of the requirement of proration throughout the period of the tender offer. 28/ Proration throughout the offering period is a Commission regulatory requirement; the statute requires proration for only the first ten days of a tender offer. 29/ Similarly, shareholders might opt out of the 20-day minimum offering period; again, this requirement is found in the Commission's rules, not in the Williams Act

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28/ *See* Rule 14d-8, 17 C.F.R. 240.14d-8.

29/ Securities Exchange Act Section 14(d)(5)([?]).

itself. 30/ The effect of these types of shareholder votes would be to make tender offers for a company more, rather than less, likely, and thus, presumably, to raise share prices. Of course, this concept might be extended to permitting shareholders to opt out of the Williams Act altogether. Since, however, the Williams Act is a federal statute, that type of broad alternative would presumably require Congressional action.

In light of that 47 percent premium I mentioned earlier, these types of pro-tender offer opt-outs might be attractive to shareholders. On the other hand, another result might occur. At present, if management recommends it, shareholders typically approve by a wide margin anti-takeover amendments. Thus, it seems not unlikely that, if additional anti-takeover amendments become possible by virtue of federal law, they will be adopted by shareholders in some cases. It might be that many companies would persuade their shareholders to vote for whatever version of federal requirements was most inhibitory to tender offers.

More generally, the opt-out proposal raises profound new questions about Williams Act shareholder protections. Should shareholders be able to forego those protections which the Commission has determined are appropriate for tender offers generally? Should they be able to make their company takeover proof? Does it matter whether takeover defenses of this sort make economic

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30/ Rule 14e-1, 17 C.F.R. 14e-1.

sense for shareholders? Is there any reason why this idea should be limited to Williams Act protections? An editorial in today's Wall Street Journal quotes Commissioner Grundfest, the father of the opt-out idea, as suggesting that such an extension might be appropriate. "It makes sense," he says, "to look at an individual corporation's right of self-determination." 31/ The Journal agrees: "Indeed, shareholders need to be consulted more often on all defensive tactics that entrench managers and decrease shareholder return." 32/

In any event, the "opt-out" concept release has not yet been drafted, and thus its scope and content have not yet been decided. It should, however, be available for public review and comment shortly.

V. Conclusion

Tender offer regulation is perhaps the most dynamic and difficult area currently confronting the Commission. One of the lessons we seem to be learning is that the market is a more powerful regulator of takeovers than the SEC can ever be. Today's novel defense or takeover tactic is passe tomorrow. Greenmail and golden parachutes,

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31/ "Better Ideas at the SEC," Wall St. J., Jan. 15, 1986, at 24.

32/ Id.

for example, were, at one time, regarded as serious and novel problems. Today, events have largely passed them by. We may already be seeing the demise of the poison pill as a defense, as bidders devise antidotes.

In the long run, the takeover boom is likely to subside. But it will leave a legacy. First of all, takeover regulation has created great tension between the role of federal and state law in governing corporations. The result is intensive study of that balance. Second, takeover regulation problems are now beginning to raise questions concerning whether shareholders should have a say in the regulatory framework in which their company operates. In short, the relationship between corporate governance, management prerogatives, and shareholder sufferage may well change in ways which will survive after the takeover phenomenon which has spurred them is part of history.

Thank you.