UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
BOSTON REGIONAL OFFICE

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COMMISSION AUTHORIZED

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September 2, 1988

The Honorable Joseph D. Alviani
Secretary
Executive Office of Economic Affairs
One Ashburton Place--Room 2101
Boston, MA 02108

Dear Mr. Secretary:

The staff of the Federal Trade Commission is pleased to respond to your letter of invitation of August 2, 1988, to provide comments to the Commission to Review the Massachusetts Anti-Takeover Laws on the role of the state in regulating corporate takeovers. */ Chapters 110C, 110D, and 110E of the Massachusetts General Laws currently regulate corporate takeovers. The principal provisions of Chapter 110C contain disclosure requirements with which offerors in takeover bids must comply, prescribe a minimum period for which such bids must remain open, and require that all shareholders who tender their shares receive the benefit of any increases in the offer price for the target firm's shares. Chapter 110D regulates "control share" acquisitions of certain companies incorporated in Massachusetts by prohibiting bidders for corporate control from voting "control shares" unless a majority of "disinterested" shareholders has voted to authorize the exercise of that right. 1/ Chapter 110E regulates control share acquisitions of certain companies incorporated outside of Massachusetts. 2/

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*/ These comments are the views of the staffs of the Bureau of Competition and of the Boston Regional Office of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

1/ Chapter 110D is similar to an Indiana "control share" statute whose constitutionality was recently upheld by the Supreme Court in CTS Corp. v. Dynamics Corp., 107 S. Ct. 1637 (1987). The Court held that the Indiana law was not preempted by the federal Williams Act, 15 U.S.C. § 78m(d)-(e), 78n(d)-(f), or Securities and Exchange Commission regulations promulgated thereunder, and did not unconstitutionally interfere with interstate commerce.

2/ Chapter 110E differs from the Indiana statute that was upheld by the Supreme Court in that it also applies to
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We believe that Chapters 110D and 110E are likely to deter takeovers that may increase economic welfare. If the Commission nevertheless decides to recommend that those provisions be retained, we suggest that it consider recommending that Chapters 110D and 110E be made applicable solely to corporations that affirmatively elect to be covered by them through amendments to the corporations' articles of organization. 3/ An affirmative "opting-in" provision would enable the shareholders of each corporation to determine whether restraints on the transfer of corporate control are in the interests of the corporation. With respect to Chapter 110C, we believe that certain waiting periods imposed by that chapter have the potential of delaying takeover bids beyond the waiting period already mandated by federal law. The result may be to deter takeovers.

A. Interest and Experience of the Federal Trade Commission

The Federal Trade Commission is charged by statute with preventing unfair methods of competition and unfair or deceptive practices in or affecting commerce. 15 U.S.C. § 45. Pursuant to this mandate, the Commission seeks to identify restrictions that impede competition or increase costs without offering countervailing benefits to consumers. Our efforts have included providing comments to federal, state, and local legislatures and administrative agencies on matters that raise issues of competition or consumer protection policy.

The Commission has substantial experience in the area of mergers and acquisitions. The Commission enforces section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions of corporate assets or securities that may substantially lessen competition or tend to create a monopoly. Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, the Commission reviews proposed acquisitions of corporate securities, including tender offers, to determine whether they violate the antitrust laws.

The Commission's staff has addressed issues related to the market for corporate control through scholarly studies and com-

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nonresident corporations. We do not address here the constitutional issues raised by that feature of the chapter. See CTS Corp. v. Dynamics Corp., 107 S. Ct. at 1651-52; Edgar v. Mite, 457 U.S. 624, 645-46 (1982).

3/ Chapter 110E contains an opt-in provision which, because it allows opting in through an amendment to corporate by-laws, does not necessarily require a shareholder vote.

ments to state governments. Last year, the Commission's Bureau of Economics published a study on the effects of takeover legislation enacted by New York in 1985. 4/ In the past two years, the Commission's staff provided comments on corporate control legislation to the governor of New York and to the New Jersey, Delaware, and Texas legislatures.

B. Effect of Takeovers on Economic Welfare

The corporate takeover is a mechanism for transferring control of corporate assets. The transfer of corporate control can serve a number of economic functions, such as facilitating the redeployment of corporate assets to more efficient uses and improving corporate management. Although not every takeover ultimately produces such benefits, we believe that takeovers in the aggregate are likely to enhance economic efficiency.

Some studies suggest that management-opposed corporate acquisitions are most commonly carried out when outside bidders have an opportunity to improve the performance and thereby increase the value of target corporations. 5/ Such bidders pay substantial premiums over the pre-offer market price of the shares of target corporations because they believe that the corporations will be worth more under their control. 6/

There are a number of sources for the potential gain in an acquired firm's performance. In some cases, bidders are able to improve the management of the target firm. In other cases, bidders may be able to combine firms with complementary strengths, integrating production or distribution channels, eliminating duplicative functions, or facilitating mutually beneficial technology transfers. Takeovers may also permit firms

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4/ L. Schumann, State Regulation of Takeovers and Shareholder Wealth: The Effects of New York's 1985 Takeover Statutes (Federal Trade Commission, Bureau of Economics, 1987).

5/ See Bradley, Desai & Kim, The Rationale Behind Interfirm Tender Offers: Information or Synergy, 11 J. Fin. Econ. 183 (1983); Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers, 33 Stan. L. Rev. 819 (1981); Easterbrook & Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981).

6/ There is evidence that share prices of most target companies significantly underperform the market in the pre-offer period. See Gilson, supra note 5, at 852-53, and sources cited therein.

to shift corporate assets to more efficient uses by selling or changing the use of underperforming facilities.

The transfer of corporate control in such circumstances is likely to benefit shareholders, employees, and the economy as a whole, as well as the successful bidder. Shareholders benefit in two ways. First, because bidders for corporate control offer substantial premiums over the pre-offer market price of corporate shares, target company shareholders enjoy rapid appreciation of the value of their shares. Second, the threat of takeovers may motivate incumbent corporate managers to improve corporate performance. Employees benefit from enhanced corporate efficiency and the accompanying gains in corporate competitiveness. 7/ The economy can benefit both from the transfer of corporate control to more efficient management and from the incentives that takeovers create for improved managerial performance.

Numerous scholarly studies have concluded that takeovers, on average, lead to an increase in the stock market's valuation of both the acquired and the acquiring firms. According to a recent study, share prices of acquired firms increase by an average of 53.4 percent. 8/ Different studies report that the share prices of acquiring firms have tended in the past to increase by smaller amounts, ranging from 2 percent to approximately 7 percent, 9/ although in this decade acquirers may have experienced no gains at all. 10/ Even if the acquiring company's

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7/ Profitable firms provide the best opportunities for wage growth, new employment, and the fulfillment of pension and other contractual obligations to workers.

8/ Office of the Chief Economist, Securities and Exchange Commission, The Economics of Any-or-All, Partial, and Two-Tier Tender Offers, Table 4A (1985).

9/ Those findings are summarized in Jensen & Ruback, The Market for Corporate Control: The Scientific Evidence, 11 J. Fin. Econ. 5, 11 (Table 3), 16-22 (1983). See also Jarrell & Bradley, The Economic Effects of Federal and State Regulations of Cash Tender Offers, 23 J. Law Econ. 371, 393-95 (1980); Council of Economic Advisers, Economic Report of the President 197 (1985).

10/ See Jarrell, Brickley & Netter, The Market for Corporate Control: The Empirical Evidence Since 1980, 2 J. Econ. Persp. 49 (1988). A recent study of the effects on the stock prices of the acquiring firms in 78 hostile takeovers between 1976 and 1981 concluded that those firms lost 42 percent of their value over the three years following their acquisitions. Magenheim &
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shares experience no gains, these studies suggest that the market values the combination of the acquirer and the target company more highly than the individual firms that would exist in the absence of a takeover. 11/

These studies measure the stock market performance of the companies involved during short periods of time surrounding takeover bids. They may be viewed as offering the stock market's long-term valuation of takeovers based on the information available at the time the takeover is announced. These valuations may change over time as more information is gained about the likely effects of the takeover. Thus, these studies serve only as indirect estimates of long-term performance. Economic scholars largely agree, however, that the increases in company valuations reported by these studies represent efficiency gains. See note 13, infra. Of course, sharp fluctuations in market values, such as those experienced during last year's stock market crash, may require a cautious approach to long term conclusions. Some scholars have also questioned the overall effects of mergers and unsolicited takeovers on economic efficiency. 12/

A substantial body of economic and legal literature supports the view that these increases in the stock market's valuation of

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Mueller, Are Acquiring-Firm Shareholders Better Off After An Acquisition?, in Knights, Raiders, and Targets 171 (J. Coffee, L. Lowenstein & S. Rose-Ackerman ed. 1988). That study has been criticized for using methodology that significantly overstates the losses of the acquiring firms' value. See Bradley & Jarrell, Comment, id. at 254. Bradley and Jarrell, using the data from the Magenheim-Mueller study and a different methodology, concluded that the acquiring firms' three year losses were actually statistically insignificant. Significantly, they also note that even when "acquiring firms suffer capital losses, the gains to targets outweigh these losses, and the net effect is a significant increase in the value of the combined assets." Id. at 256.

11/ Similarly, share prices of both bidding and target firms usually decline after unsuccessful takeover bids to below the pre-offer level. Bradley, Desai & Kim, supra note 5, at 189-204; Jensen & Ruback, supra note 9, at 8.

12/ See Ravenscraft & Scherer, The Long-Run Performance of Mergers and Takeovers, in Public Policy Toward Corporate Takeovers 34 (M. Weidenbaum & K. Chilton ed. 1988); Herman & Lowenstein, The Efficiency Effects of Hostile Takeovers, in Knights, Raiders, and Targets, supra note 10, at 211.

firms following a takeover represent efficiency gains, and the creation of new wealth, attributable solely to the takeover. 13/ Participants in the stock market are not likely to bid up the price of equity securities involved in takeovers unless prior takeovers, on average, produced such gains. Other studies quarrel with these conclusions, but many of these studies contain methodological errors. 14/ A major scholarly study that relied on accounting data took issue with the conclusions of the stock market studies and concluded that takeovers neither improved nor degraded the performance of the target firms. 15/

13/ See, e.g., Economic Report of the President, supra note 9, at 187-216; Jensen & Ruback, supra note 9; Jarrell, Brickley & Netter, supra note 10; Bradley, Desai & Kim, supra note 5; Gilson, supra note 5; Easterbrook & Fischel, supra note 5; Easterbrook & Jarrell, Do Targets Benefit from Defeating Tender Offers, 59 N.Y.U. L. Rev. 277 (1984); Pound, Lehn & Jarrell, Are Takeovers Hostile to Economic Performance?, Regulation, Sept.-Oct. 1986, 25.

14/ For example, Weidenbaum & Vogt, Takeovers and Stockholders: Winners and Losers, 19 Cal. Mgmt. Rev. 157 (1987), incorrectly relied on evidence concerning negotiated mergers to conclude that management-opposed takeovers reduce efficiency. When the evidence of management-opposed takeovers reviewed by the authors is examined separately, it supports the conclusion that takeovers enhance efficiency. Similarly, Lipton, Takeover Bids in the Target's Boardroom, 35 Bus. Law. 101 (1979), offered evidence purporting to show that stockholders benefited from management resistance that resulted in the defeat of takeover bids. Lipton's evidence showed that the share prices of some firms that had defeated takeover bids increased above the tender offer price a number of years later. His study did not compare these share price movements to the overall market's movement during the same period. More systematic studies, which examine abnormal returns on shares of takeover targets compared to overall market trends, show that stockholders incur significant losses from the defeat of takeover bids. See generally Easterbrook & Jarrell, supra note 12, at 282-84.

15/ D. Ravenscraft & F. Scherer, Mergers, Sell-Offs, and Economic Efficiency 101-03 (1987). The authors used accounting data to measure economic rates of return. This methodology is controversial because profits revealed by such data are subject to wide variations resulting from the use of divergent accounting conventions by different firms. See generally Benston, The Validity of Profits-Structure Studies with Particular Reference to the FTC's Line of Business Data, 75 Am. Econ. Rev. 37 (1985); Fisher & McGowan, On the Misuse of Accounting Rates of Return to

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Accordingly, no scholarly consensus on the economic effects of takeovers supports changes in the law to make management-opposed takeovers more costly and difficult. On the contrary, we believe that the preponderance of scholarly opinion on the subject supports the conclusion that management-opposed takeovers produce economic benefits, and that new restrictions on takeovers are likely to undermine economic efficiency.

C. Asserted Disadvantages of Takeover Activity

Purported disadvantages of takeover activity are often asserted to justify restraining corporate acquisitions. Although we know of no empirical research to substantiate these disadvantages, they are often cited by incumbent managers and other takeover critics in testimony before Congressional committees and in articles in the general press. In the absence of persuasive substantiating evidence, these claims do not support the enactment of curbs on takeover activity.

Some takeover critics claim, for example, that acquirers often take over well-managed corporations, oust good management, and reduce corporate efficiency by installing less capable management teams. This, indeed, may happen in some cases. Corporate acquirers, like all other businesspersons, may make mistakes. This possibility, however, does not justify controls on takeover activity any more than the possibility of poor investments in plant or equipment justifies government controls on investment decisions made by corporate managers. In a market economy, investment decisions generally are best left to investors, who stand to profit from correct decisions and lose from poor ones. The critical fact is that takeover activity, in the aggregate, has not been demonstrated to have adverse effects and in fact appears to benefit society. Because the evidence suggests that the benefits of takeovers outweigh their costs, restricting takeovers in the hope of preventing unwise investments is likely to harm societal welfare.

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Infer Monopoly Profits, 73 Am. Econ. Rev. 82 (1983). In addition, because of constraints on the availability of data, the study focuses largely on conglomerate mergers, and not management-opposed takeovers. See Ravenscraft & Scherer, supra, at 22. As the authors observe, however, the incidence of horizontal merger activity has increased markedly in this decade, and "[t]he shift toward large horizontal mergers is more difficult to evaluate solely on the basis of our research." Id. at 219.

It also has been argued that management-opposed takeovers result disproportionately in facility closings and lay-offs, which impose great social costs on individuals and communities in which plants are located. But factual support for the position that takeovers in fact lead to plant closings and lay-offs that would not have occurred otherwise is, at best, scanty. 16/ Indeed, it is difficult to assess whether or not closings or lay-offs that occur after takeovers would have been carried out by the target's management in any event to keep the firm competitive. Moreover, most economic changes that increase efficiency -- and thereby increase aggregate societal wealth -- create dislocations that reduce the welfare of some individuals. 17/ Virtually every major technological advance renders an earlier technology obsolete and thus may harm firms and individuals dependent on the earlier technologies.

Finally, it is argued that takeovers force corporate managers to focus on short term profits and forego long term investments. The evidence shows, however, that foregoing long term investment makes companies more, not less, vulnerable to takeovers. Takeover targets tend to have below-average research

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16/ See Jensen, Takeovers: Folklore and Science, Harv. Bus. Rev. Nov.-Dec. 1984, at 114 ; cf. American Enterprise Institute, Proposals Affecting Corporate Takeovers 31 (1985) (citing finding that "very few jobs were affected" by 6,000 corporate acquisitions in 1970s). The AFL-CIO estimates that a total of 80,000 jobs of members of its affiliated unions have been lost as a "result of corporate restructuring" in recent years. Hostile Takeovers, Hearings Before the Senate Committee on Banking, Housing, and Urban Affairs, 100th Cong., 1st Sess. 262 (1987) (statement of Thomas R. Donahue) (hereinafter "Hearings on Hostile Takeovers"). Even assuming that this estimate, for which the time frame is unspecified but presumably spans a number of years, is correct, it is difficult to assess how many of those jobs would have been abolished in any event to improve the competitiveness of the affected companies. To put the figure in perspective, a total of 5.1 million workers lost their jobs because of plant closings or efficiency measures in the years 1979-1983. Bureau of Labor Statistics, Monthly Labor Review (June 1985).

17/ It would seem preferable for government to respond to these inevitable economic dislocations by initiating effective remedial measures to assist displaced individuals rather than severely restricting economic activity that benefits society. Such measures may include, for example, programs to retrain workers displaced from declining industries.

and development budgets, showing a lesser commitment to long term investments than the average firm. 18/

D. Effects of the Massachusetts Takeover Statutes

Chapters 110D and 110E of the Massachusetts General Laws regulate "control share acquisitions", which they define as the acquisition of shares that, but for the statutes' requirements, when added to the acquiring person's preexisting shares, would entitle the acquirer to exercise voting power within one of three ranges: one-fifth to one-third, one-third to one-half, or a majority of all voting power. 19/ Chapter 110D applies to control share acquisitions of certain companies incorporated in Massachusetts, while Chapter 110E applies to control share acquisitions of certain companies incorporated outside of Massachusetts. Both chapters provide that a person who acquires "control shares" may exercise the right to vote those shares only if the holders of a majority of the corporation's voting shares, other than "interested shares," vote to grant the acquirer that right. The term "interested shares" is defined as shares owned or controlled by the acquirer, by the target corporation's officers, or by the target corporation's inside directors (corporate directors who are employed by the corporation). Shares owned by outside directors are not considered "interested."

Under the provisions of Chapters 110D and 110E, an acquirer of "control shares" may demand a special shareholder meeting "for the purpose of considering whether voting rights shall be authorized for the shares acquired or to be acquired in the control share acquisition." If the request is accompanied by "an undertaking to pay the corporation's reasonable expenses in connection with the special meeting", the corporation must hold such a meeting within 50 days of the date of the demand. If no such demand is made, voting rights of control shares must be

18/ This proposition is supported by a recent empirical study of the investment patterns of takeover targets. The study, which examined all 217 takeover targets that were acquired between 1980 and 1984, found that takeover targets had below average ratios of (i) research and development expenditures to total expenditures and (ii) capital investment to earnings. Office of the Chief Economist, Securities and Exchange Commission, Institutional Ownership, Tender Offers, and Long-Term Investment 8-10 (1985).

19/ In practical terms, for most purposes of Chapters 110D and 110E, any shares whose acquisition would give the acquirer more than 20 percent of the corporation's voting power are "control shares."

considered at the next annual or special meeting of the corporation. Section 7 of Chapter 110D provides that if "disinterested" shareholders vote to confer voting rights upon "control shares," dissenting shareholders, unless otherwise provided in the corporation's by-laws or articles of organization, gain the right to demand payment for their shares and an appraisal of their value. The amount received by dissenting shareholders may not be less than the highest price per share paid by the person who made the control share acquisition.

Chapters 110D and 110E impose a number of restrictions on the ability of potential acquirers to obtain control of target companies. First, a potential acquirer who has purchased a majority of a corporation's voting shares is not assured of obtaining actual control of the firm. Rather, the acquirer is required to wager that the so-called "disinterested" shareholders will agree to grant it the voting power that ordinarily passes with the ownership of shares. In the event that the "disinterested" shareholders do not so agree, the value of the acquired shares is likely to decline significantly. This restriction may discourage many potential acquirers from even attempting takeover bids. Moreover, the statutes likely exact from acquirers a penalty that increases directly with the size of their investment in the target firm; the larger the acquirer's investment in a firm, the less likely it would be to gain control, since the remaining "disinterested" shares may be in the hands of entities friendly to management, such as outside directors and employee stock ownership plans.

Second, although an acquirer may demand a special shareholder meeting to consider the voting rights to be accorded "control shares," the special meeting can be delayed for as much as 50 days after it is requested. At a minimum, this requirement will add three weeks to the 20-business day minimum tender offer period that bidders now face under federal law. See 17 C.F.R. § 240.14(e)(1). During that additional period, potential acquirers must bear a significant financial burden. To avoid the risk of paying a premium price for what ultimately will be non-voting shares, bidders will have to extend the duration of tender offers to at least the 50-day waiting period imposed by the statute. During that period, they must bear the cost of capital for financing the acquisition, though they have no assurance that the acquisition will ultimately be made. By so increasing the costs of acquisition efforts, the provisions of Chapters 110D and 110E likely reduce their frequency. 20/

20/ Alternatively, bidders could make conditional tender offers, pursuant to which acceptance of tendered shares is contingent on
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Chapter 110C contains several provisions regulating takeover bids that are similar to those in the federal Williams Act and the regulations promulgated thereunder. Sections 6 and 7 of that chapter, however, also contain certain provisions that, like Chapters 110D and 110E, have the potential for extending the minimum time period for which offers must remain open significantly beyond the 20 days required by federal law. 21/ Section 6 provides that the state secretary may take as long as 45 days from the commencement of an offer to adjudicate whether the takeover bid is in compliance with the disclosure and other requirements of Chapter 110C. Section 7 requires that a takeover bid remain open for at least 15 days after it is deemed to be in compliance with the chapter. Thus, the effect of sections 6 and 7 is that an offeror faces the possibility of having to keep the offer open for up to 60 days, which is more than four weeks longer than the 20-business day requirement of the Williams Act. The result, like that of the 50-day waiting periods imposed by Chapters 110D and 110E, will likely be to increase the costs and uncertainty of acquisition efforts.

The overall effect of statutes that increase both the cost and uncertainty of takeover bids is likely to be a reduction in

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the subsequent approval of voting rights for those shares. Because the 50-day waiting period in the proposed legislation exceeds the minimum offering period under federal law by three weeks, however, incumbent management would gain an additional three week period between the conditional acceptance and the shareholder vote in which to adopt defensive measures to thwart the tender offer, such as the sale of corporate assets to another firm. Under the "business judgment rule," such actions may be insulated from judicial scrutiny. *See* 3A W. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 1041.1 (rev. perm. ed. 1986). In addition, a conditional offer is less likely to be successful than an unconditional one, since some shareholders will not wish to tie up their shares for the period during which the voting right issue remains unsettled.

21/ Section 3 of Chapter 110C provides that prospective takeover bid acquirers who fail to disclose their intent to gain control of the target company before acquiring five percent of its stock may not make a takeover bid for that target until one year after the failure to disclose. Since the United States Court of Appeals for the First Circuit recently upheld a lower court injunction against the enforcement of that section on the grounds that it likely is both unconstitutional and preempted by the Williams Act, we do not discuss it here. Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837 (1st Cir. 1988).

the number of tender offers and the diminution of the ability of shareholders to exercise their rights as owners to transfer control of corporations. 22/

F. Empirical Evidence on Effect of Anti-Takeover Legislation

Three recent empirical studies concerning the effect of anti-takeover legislation have concluded that anti-takeover laws harm shareholders and undermine economic efficiency. A recent empirical study by the Commission's Bureau of Economics analyzed the extent of the economic harm caused by a New York statute 23/ restricting "business combinations." 24/ The study found that the announcement by New York's governor of the proposed legislation that ultimately became the New York law resulted in a statistically significant decline in the average value of shares of New York corporations. The decline was equal to approximately one percent of the value of the shares, or $1.2 billion. 25/ As the study noted in conclusion:

> [D]espite the political rhetoric advocating the regulation of takeovers on behalf of shareholders, the evidence . . . indicates that this very strong statute does not protect shareholders; rather, the law protects managers at the expense of shareholders. . . . [In addition, the statute] may promote the inefficient management of society's assets by lessening the ability of capital markets to efficiently reallocate assets. Consequently, the real cost of the goods and services produced by the firms affected by [the statute] may increase, injuring consumers as well as shareholders. 26/

22/ See generally Easterbrook & Fischel, supra note 5.

23/ New York Bus. Corp. Law § 912.

24/ Schumann, supra note 4. "Business combination" statutes restrict the ability of acquiring firms to merge or engage in other specified business activity with unsolicited takeover targets for a specified period of time following the acquisition of target company shares.

25/ Id. at 41, 46-47. Continuing research by the same author suggests that the decline in the value of New York corporations caused by the enactment of the legislation may have been significantly greater than reported in his original paper. Measured over the entire 205-day course of the legislative process, the decline was 9.7 percent, net of market. L. Schumann, State Regulation of Takeovers and Shareholder Wealth: The Case of New York's 1985 Takeover Statutes (mimeo April 1988).

26/ Schumann, supra note 4, at 47.

Another study, conducted by the Office of the Chief Economist of the Securities and Exchange Commission, also concludes that anti-takeover legislation is harmful to the interests of shareholders. The study examined the effects of a recent Ohio law that, among other things, authorized corporate directors to consider the interests of persons other than the shareholders in assessing takeover bids. 27/ The SEC study found that the enactment of the Ohio law caused an immediate two percent decline in the equity value of corporations insulated from takeovers by the Ohio law. Finally, a recent study on the effects of Indiana's anti-takeover statute, which contains a "control share" provision similar to those in Chapters 110D and 110E, found that the enactment of Indiana's law caused a 4.2 to 6.1 percent decline in the value of shares of Indiana corporations. 28/

G. Consideration of an "Opting-In" Mechanism

If the Commission decides to recommend the retention of Chapters 110D and 110E despite the concerns discussed above, we suggest that those control share provisions be modified to make them applicable only to corporations whose shareholders affirmatively elect to be covered by them through amendments to the corporations' articles of organization. Chapter 110D currently applies to certain domestic corporations that do not "opt out" by an amendment to their articles of organization or by-laws. Chapter 110E applies to certain nonresident corporations that opt into its provisions by amendments to their by-laws or charters. To the extent that Chapters 110D and 110E are motivated by a concern for shareholders, their purposes would be better served by a requirement that shareholders approve a decision to opt into any coverage by them. Corporate by-laws generally may be amended by the board of directors without the approval of the shareholders. 29/ The votes of directors to amend the by-laws to opt into coverage by control share restrictions may be influenced by the directors' loyalty to

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27/ Office of the Chief Economist, Securities and Exchange Commission, Shareholder Wealth Effects of Ohio Legislation Affecting Takeovers (1987). The Ohio law is codified in Ohio Rev. Code Ann. § 1701.01 et seq. (Page 1986 supp.).

28/ Sidak & Woodward, Corporate Takeovers, The Commerce Clause, and the Efficient Anonymity of Shareholders (mimeo March 1987). The 4.2 percent decline represents a portfolio in which equal weight is given to all Indiana firms. The 6.1 decline represents a value-weighted portfolio.

29/ See M.G.L. c. 156B § 17.

existing management, whose jobs may be threatened by a takeover. 30/ The result may be to discourage takeovers that would benefit the shareholders. Therefore, we recommend that a corporation's decision to opt into the statutory schemes of Chapters 110D and 110E be made solely through a shareholder vote amending the articles of organization.

Conclusion

On the whole, we believe that vigorous takeover activity enhances economic efficiency and thus benefits consumers, workers, and shareholders. We believe that the state's takeover statutes are likely to impede many of the beneficial consequences of takeovers without offering countervailing benefits. The Commission therefore may wish to consider whether those statutes unduly interfere with the market for corporate control to the detriment of the economy and consumer welfare generally.

Sincerely,

Phoebe D. Morse

Phoebe D. Morse
Regional Director

30/ Indeed, the senior managers whose jobs may be most threatened by a takeover often sit on their corporation's board of directors.