REMARKS ON BEHALF OF
THE NORTH AMERICAN SECURITIES
ADMINISTRATORS ASSOCIATION, INC. (NASAA)
BEFORE THE SEC ADVISORY PANEL ON TAKEOVERS
KENSINGTON ROOM, WESTBURY HOTEL,
15 E. 69th ST., NEW YORK CITY
JUNE 2, 1983
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The North American Securities Administrators Association welcomes this opportunity to make additional comments to this advisory panel on takeovers. My name is Orestes J. Mihaly. I am the chairman of NASAA's Tender Offer Committee. I am also the Assistant Attorney General in charge of the Bureau of Investor Protection and Securities in the office of the Attorney General Robert Abrams of the State of New York and have been such since the enactment of the Security Takeover Disclosure Act of New York in 1976. I participated in the drafting of the original New York Law as well as amendments thereto which were designed to blunt many of the arguments of constitutional infirmity that were raised to state takeover laws in general. I believe that had a statute such as New York's gone up to the Supreme Court that a different holding would have resulted from that which we saw in the MITE case and the whole tenor of discussion before this advisory panel would have been different.

NASAA has previously provided this panel with our Statement of Position which was adopted by its membership at its annual spring conference on April 23, 1983 with which I am sure all of you are familiar. This panel has come to a critical stage of its deliberations. Preliminary reports have been prepared and advisory votes have been taken indicating to a great degree the final position that may be taken by the panel in its recommendations to the S.E.C. I must say that we are disappointed, but not suprised, by what we feel will be the final position of a majority of this Panel. It is apparent that a majority of the panel believes that hostile tender offers, as we know them, are beneficial or good and that any efforts to slow them down or to substantively regulate them should be discouraged as a matter of principle.

Justice Arthur Goldberg speaking at the May 13th public meeting in New York City in his belated first appearance was very astute in his observations that (1) the first interest in the regulation of this area is the public interest and (2) the public perception of the problem is perhaps more important than the substance of the problem. He stated that the perception of the press and the media is that hostile tender offers have become a

national scandal or a fiasco. He also opined that while he believed in a free economy, he also believed in the necessity of reassuring the public of the United States that the regulatory agencies and the law are doing their job in protecting them from abuses. He urged the panel to put aside its previous predilections, find the abuses and deal with them by submitting sensible proposals to Congress. We believe that Justice Goldberg is right. There is a general perception by the public that hostile takeover battles are, if not a "scandal", then certainly an extremely significant problem. Numerous commentators, public officials and, most importantly, members of Congress have expressed such a perception and concern. Indeed, it was this concern that prompted twelve members of the Senate Banking Committee including Senator Garn, the chairman, and Senator Proxmire, the ranking minority member, by letter dated February 1, 1983 addressed to Chairman Shad of the SEC to urge the SEC to conduct a broad and comprehensive approach to the study to the questions involved including: what is a corporation's obligation to its stockholders, its employees, consumers and the community in a takeover situation; should there be corporate democracy to determine whether acquisitions take place; how and should federal regulation address the fact that although billions are spent in

the acquisition of companies not one new factory, or new equipment, or other means of direct benefit to the economy is created. These concerns as well as others were given as a charge to this panel. These Senators specifically recognized that some of the issues presented were outside the direct jurisdiction of the SEC but they felt that the committee would be sufficiently broad based to deal with the issues presented.

It is our observation that this panel has not really focused on several of the fundamental issues involved which Congress clearly asked be addressed. There has been little real discussion, let alone debate, on the fundamental question of whether hostile tender offers are good. It has been taken almost as a "given" that they are intrinsically "good" and that little, if anything, should be done to discourage them. Once this premise is assumed, then it is very easy to adopt an entire series of recommendations which would facilitate the bidder and hinder the target company. It was not until the very last moments of the May 13, 1983 meeting that panel member Attorney Martin Lipton observed his concern that the panel appeared to be making an unfounded assumption that tender offers are basically good.

A mere recitation of the list of abuses and problems generated by the relatively recent takeover phenomenon and the suggested proposals to alleviate or solve them indicates that there should be some serious doubt as to the basic premise that hostile offers are good. Saturday night specials, creeping tender offers, golden parachutes, green mail, two-tiered offers, pac-man defenses, lock ups and leg ups, partial front end loads, advisory voting, changes in the business judgment rule, preemption of state corporate or securities laws, turf battles between regulators, concentration of power and monopoly and anti/trust problems, shark repellants, scorched earth policies, and sale of crown jewels, as well as problems stemming from takeovers such as plant closings, moving of corporate offices, employment cutbacks and local economy dislocations.

An unbiased observer has to ask: What countervailing benefits outweigh these abuses and problems and the proposals for their solution? We submit that there is very little. Indeed, there is considerable evidence that in even purely economic terms, using an analytical model that takes into account new capital investment, internal cash flow support to the acquired company, as well as the incremental market value of shares issued

in the acquisition, gives a substantially different picture of many of the major acquisitions over the last several years. As an example of that particular anaytical model, I would make reference to the article by Mr. Wolf Weinhold appearing the Forum section of the April 17, 1983 New York Times. Mr. Weinhold's article focused on the economic "bottom line" of the acquisition in 1975 by General Electric Corporation of Utah International. His article summarized the net economic effect of the GE/Utah acquisition to involve a total of approximately negative $3 billion amount as a rough measure of the wealth lost by GE's pre-Utah acquisition shareholders. The article cited other examples of a substantial negative economic bottom line for acquisition/take-overs such as Exxon's acquisition of Reliance Electric, Warner-Lambert's acquisition of Entemann, Sohio's acquisition of Kennecott and Atlantic Richfield's acquisition of Anaconda. All were considered well-run corporations, yet each of those acquisition decisions has lead to hundreds of millions of dollars in lost shareholder wealth. There are numerous other examples, including DuPont/Conoco and U.S. Steel/Marathon Oil.

Also confronting those who contend there is a net bottom line positive effect of takeovers and acquisitions is the

damning evidence of numerous divestitures that have recently been made or are contemplated involving corporate acquisitions that were supposedly "made in heaven" just a few short years ago.

Consideration of those economic facts of large-sale divestitures occurring with great frequency in the corporate marketplace, together with a more accurate analytical approach evidenced in Mr. Weinhold's article, indicate that a truer picture of the economic bottom line of takeovers is far more negative than the economic claims made to date.

The legislatures of some 37 states at one time or another responded to very real concerns; namely, areas of shareholder abuse brought about by the "Saturday Night Special" hostile takeover raid, as well as the possible disruption of the local state economies, by enacting state takeover statutes. Perhaps the form taken by the state responses to the problems -- specifically, adopting separate state takeover laws rather than acting under the existing business corporation laws to regulate takeovers -- was not the correct form as ultimately determined by the MITE case on constitutional grounds; nevertheless, these concerns at the state level still exist. Consequently, if the

shareholder abuses and disruptions to local economies persist as a result of hostile takeovers, the states will be forced to act in what they perceive to be the best interests of their citizens and local economies. State legislatures are even now adopting new and different approaches to these concerns. For example, the legislature of a western mining state will be concerned with the impact on its economy that would result from the hostile takeover of its principal industry. Similarly, other state legislatures are concerned with their local industries. It is not a myth that whole plants are shut down or moved after a takeover. It is a reality. No amount of academic study of market pricing will disprove this. These are the legitimate concerns of the American people as represented by their state legislatures. While state securities administrators do not have direct authority to deal with the economies of their states per se, they are obliged to point out that this problem or this perception of the problem exists. To ignore it is to put one's head in the sand. The problem has to be faced head on, otherwise

we will go through another interminable series of legislative enactments and legal challenges. How can the states be assured that their resident shareholders are not adversely affected by abusive takeover practices and that their local economies will not be disrupted? How can Congress be assured that the national economy is not also suffering as a result of the composite of the adverse effects of takeovers on various local economies? We have not heard enough debate on these very fundamental issues which must be resolved before specific solutions and approaches are suggested or adopted.

It is important that this panel consider and actively seek out the comments and imput of other economists such as Professor Robert B. Reisch of Harvard who was quoted in the New York Times of May 31, 1982 as saying "Since 1965 we've had a declining rate of productivity increase, and that has probably been associated with the increase in conglomerate mergers...Many companies are assuming the same role as financial institutions; corporate headquarters are coming to resemble institutional investors, as more and more talent goes into asset rearranging and less and less into the production of products."

It is important that this panel consider and actively seek out the comments and input of more businessmen such as Edgar M. Bronfman who in the Op-Ed page of the September 29, 1982 New York Times referred to the same industrialist's quote as in the February 1, 1983 Senate letter to Chairman Shad concerning "no new factories, jobs," etc., and spoke of his theory of constructive credit; that is, credit that helps the economy: people, consumers, productivity, new products, research, industrial expansion and jobs. Bronfman urged stopping tax benefits to corporations "that encourages using credit to make money for the few."

We ask how many Fortune 500 companies have been irretrievably eliminated from contributing to any future expansion of our nation's economy by the practice exemplified in the Bendix/Martin-Marietta take-over battle last year where each company borrowed to the limits of its financial capability -- and perhaps beyond -- for the purpose of acquiring another corporation. Multiply the Bendix/Martin-Marietta experience that involved approximately $4 billion of bank borrowing by the dozens of similarly financed take-overs and acquisitions over the years -- $200 billion dollars worth over the last 9 years -- and

it is not hard to see why the U.S. economy is in such sorry condition, why the job market is not expanding, and why the U.S. has the highest percentage of obsolete plant and equipment of Western industralized nations.

It is important that this panel consider and actively seek out the comments and imput of those who conclude as did Chairman Peter Rodino of the House Judiciary Committee in a letter to the Editor of the Wall Street Journal on January 15, 1983 where he stated:

> "But, among recent unfriendly takeovers involving large firms, it is difficult to find clear examples of beneficial effects (such as replacement of ineffective management or supplying of venture capital)."

Indeed, in my personal experience in administering the New York takeover law, the bidder has usually stated in public hearings that it was making the hostile offer because it liked the target and the way it was being managed.

It is important that this panel consider and actively seek out the comments and input of those such as William Chatlos, formerly of Georgeson & Co., who has conducted studies indicating the positive benefits to shareholders resulting from the presence of state takeover statutes which generally provided for more extended time periods for shareholders and the market place to consider the offer and fostered competing bids in an auction market context.

It is important that this panel consider and actively seek out the comments and input of those who are concerned with the concentration of economic power and wealth in this country as was expressed at the Mobil-Marathon takeover hearing before the House Subcommittee on Environment, Energy and Natural Resources in November of 1981 by Congressman Clarence Brown of Ohio who wondered why international oil giants would rather explore for oil on the floor of the New York Stock Exchange than in the oil fields.

Suffice it to say that in its rush to produce a report to the S.E.C. by July 8, 1983 for delivery to Congress, this panel has not tackled several fundamental issues in a meaningful

way. Consequently, those issues will have to be studied and addressed, perhaps by Congress itself, in hearings to be held in the future.

I turn now to some specific comments on the recommendations that appear to be evolving from this panel as evidenced by the written reports of the panel subcommittees and in their public discussions.

Minimum offering periods - NASAA has been in favor of longer periods of time within which tender offers may be acted upon by target shareholders in order to allow adequate disclosure to non-sophisticated, non-professional investors, especially where multiple bids are involved. The longer time periods also allow more time for the target company to defend or for a competing bid in an auction market context to develop. The 30 calendar day recommendation of the Greenhill-Flom subcommittee report would appear to be merely a small, halting step in the right direction. The difference between the current 20 business days (translating into 26 to 28 calendar days) and the subcommittee proposal for a 30 calendar day period is distressingly insignificant, especially when viewed in the context

of the importance of time in hostile tender offers which involve the change of control of corporations with huge amounts of assets, etc. We strongly urge that the time period be significantly lengthened to 60 days. This would assure dissemination of information to everyone and could balance the element of surprise with the ability to defend. Indeed, it has been found that most hostile tender offers last from 50 - 60 days. The model state takeover statute recognized this fact and required state administrators to act within such a time frame. The extension of the time period was NASAA's first priority in its Statement of Position and remains so. In line with Justice Goldberg's recommendation previously alluded to, a practical solution that can be recommended to Congress is the extension of the minimum offering period to 45 and preferably 60 calendar days.

Two tiered offers. The Greenhill-Flom subcommittee has recommended no additional action to be taken regarding this very definite area of shareholder abuse other than the extension of the pro-ration period to 30 days. NASAA believes this to be an unsatisfactory response to a significant problem - the problem of the non-professional, unsophisticated investor being stampeded

into tendering in order to obtain a higher front-end cash price. NASAA's Statement of Position took the view that two-tier offers should be designated as per-se manipulative under the federal securities law and should be prohibited. We still hold that view but submit that a substantial extension of the length of offers to sixty days with a corresponding lengthening of the pro-ration time period would be helpful in the event two tiered offers are not banned entirely.

(3) Pre-filing review. One of the most significant provisions of state takeover laws was the authority granted to the state regulatory agency to determine whether full and fair disclosure was made in an offer. We have recommended that the SEC have that same authority. This suggestion has been ignored thus far by the panel. Contrarily, a "stream-lined registration process" has been recommended to put takeovers involving exchanges of securities "on the same footing" as cash. In order to be consistent a subcommittee recommendation that really would have put cash offerings and securities offerings on an equal footing would have required a significant period of time for review by the SEC for cash offers, parallelling that for securities offerings.

Creeping tender offers. The subcommittee has recommended that a buyer be prohibited from buying 5% or more of a company before filing a Schedule 13-D and a maximum permitted holding level of 15% above which the buyer must make a tender offer unless buying directly from the issuer or in a transaction involving a block of stock held by the seller for more than 2 years. This appears to be a modified version of the so-called "British system" with exceptions. Again, this is merely a step in the right direction, rather than a complete solution to the problem. We agree with Mr. Lipton's public comments that adoption of the subcommittee's recommendations would create uncertainty and many attendant problems. Specifically, at the May 13th meeting of the panel, Mr. Lipton recommended the adoption of the threshold system with no exceptions after the threshold or, alternatively, a 45 - 60 day cooling off period after the 5% level. We therefore strongly urge that the so called "British system" be implemented without exceptions so as to preclude consolidation of substantial control blocks of a company's shares through market or private purchases. Permitting a 15% or greater holding in hostile hands may be the end of independent company status in a majority of cases. Although We applaud the elimination of the 10 day window, we urge that a significant lowering of the proposed 15% holding figure be

adopted. Surprisingly, as far as we can ascertain, no suggestions were made in the subcommittee report or in the public discussion of the panel concerning our original comments relating to ineffective remedies or sanctions for 13-D violations.

The Greenhill-Flom subcommittee generally handled other perceived problems or abuses in a manner that appears to follow the underlying assumption that hostile tender offers are beneficial or good as evidenced in the following preliminary recommendations: (1) with respect to anti-takeover charter amendments, although not entirely banned, they are merely made the subject of advisory shareholder votes; (2) state takeover law jurisdiction was relegated to "local" companies; (3) other abuses such as the pac-man defense and self-tenders were not even considered a problem which would warrant regulation.

It was during the course of the May 13th discussion of the advisory voting recommendation in the subcommittee report that it was stated that rather than an outright ban of such pro-target strategems as shark repellant charter provisions

-- which recommendation might risk an unsuccessful confrontation in Congress over the pre-emption of state corporation law - the advisory vote concept was endorsed by a majority.

It was distressing to note the comment made by Chairman Shad at that time when he urged the panel not to be inhibited from asking for total preemption of state law in this area merely on the basis that it might not be "do-able" in the Congress at this time. In this regard, as we have indicated, in our Statement of Position, NASAA does not seek authority for state securities administrators as an end unto itself. We do not consider our Statement of Position or these comments as part of a turf battle. So long as the public interest is served and takeover abuses are eliminated, we have little problem with the SEC having primary jurisdiction. It would be unfortunate if Chairman Shad's urgings were meant to be a recommendation of preemption of state securities and corporation laws. The states have operated for over 50 years side by side with the SEC in securities regulation and state corporate laws have been acknowledged by courts to be a proper exercise of state power. It would be counterproductive to the public interest to attempt to change the present scheme.

In conclusion, we would urge this panel to take a second, more careful, look at its charge and ask itself whether it has spent sufficient time and research in the discussion and debate of the fundamental issues involved in the takeover area. We submit that it has not and that Congress may be given inappropriate or inadequate recommendations for solution of the underlying problems..

If necessary, we urge that this panel consider asking the SEC or the Senate Banking Committee for additional time to make its recommendations. Alhough expeditious action is necessary, we feel that the impact of this panel's recommendations will be so significant that a slight delay in reporting to Congress would be in the public interest and could actually lead in the long run to more prompt Congressional action.