SECURITIES AND EXCHANGE COMMISSION
ADVISORY COMMITTEE ON TENDER OFFERS
Agenda of Meeting
June 10, 1983

I. Procedural

A. Approval of Minutes of May 13 meeting.

B. Chairman's Opening Remarks.
1. Developments since May 13 meeting.
2. Purpose and agenda of this meeting.

II. Economics of Tender Offers and their Regulation

III. Basic Objectives of Federal Securities Laws Applicable to Tender Offers

IV. Regulation of Acquisition of Control and of Opposition to Acquisition of Control

V. Regulation of Market Participants

VI. Conclusion

A. Chairman's Closing Remarks.
1. Committee work objectives prior to next meeting.
2. Date, time and place of next meeting.

(There will be a luncheon recess from 12:00-1:15.)

ISSUES AND RECOMMENDATIONS TO BE DISCUSSED AT JUNE 10 MEETING

This summary parallels the Committee's Agenda of Issues.

I. Definition of Activities to be Reviewed

The Committee may want to include a brief discussion in its recommendations comparable to that in paragraph I of the Agenda of Issues. E.g., The Committee found that the various techniques to acquire control are so intertwined that to regulate one method of acquisition without taking into account the affect of such regulation on other methods of acquisition of control is likely to prove at least ineffective, and at worst harmful to investors and distortive of the capital markets. While the Committee has not undertaken to address in detail all the different regulatory provisions (both state and federal) applicable to the various means of acquiring control of a public company, it did focus on those issues common to the entire spectrum of control acquisition issues, and did measure the effect of each of its recommendations on the entire spectrum of control acquisition methods.

Possible Recommendation or Observation

(1) Any regulation of one or more change of control transactions by either the Congress or the Commission should address the effects of such regulation in the context of all control acquisition techniques.

II. Economics of Takeovers and Their Regulation

A. There appears to be a diversity of views with respect to the issues presented under paragraph II.A. of the Agenda of Issues, and to date, the Committee has not undertaken to determine the prevailing view. Set forth below are three alternative approaches to these issues that the Committee may find useful in arriving at its recommendation.

The first approach would be to accept a theory advanced by some members that takeovers create real value and should be encouraged. The subcommittee on economic issues has prepared two reports 1/ summarizing papers prepared for two forums, one at the University of California, Berkeley, the other at the University of Rochester. The subcommittee's reports have asserted that, as a general matter, these economic papers indicate economic benefit from the takeover process for shareholders of both bidders and target companies.

The claimed economic benefit is measured in terms of increase in the market value of the shares of such issuers at the time of such transactions. The papers summarized indicate that in the 60 to 120 days during which a takeover transaction is considered, the target company's shares rise an average of 30% while the bidder's shares increase an average of 3%-4%. The subcommittee reported to the Committee that there is not available substantial data measuring the impact of the takeover process on market prices over a longer period of time. Further, the subcommittee was not aware of a study measuring the economic consequences of acquisitions on the financial condition or results of operations of the combined enterprises. At the June 2 meeting of the Committee, Assistant Attorney General William Baxter cited the studies

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1/ See Attachment II to minutes of April 15, 1983 Committee meeting and Attachment VI to minutes of May 13, 1983 Committee meeting.

reported on by the subcommittee and endorsed conclusions consistent with those of the subcommittee, i.e., that based on such data takeover activity was economically beneficial and should be encouraged and that regulation of takeover activity should be limited. Mr. Baxter also indicated that in general, according to the available economic literature, companies identified as potential acquirors, regardless of the target company, are valued 14% higher in the market.

At the same June 2 Committee meeting, Frank DeAngelo, assistant professor at the Graduate School of Management of the University of Rochester, accepted the methodology of the reports summarized by the subcommittee and relied upon by Mr. Baxter, but advised the Committee that he did not believe the data supported findings of such benefits to issuers. He asserted rather that the data was at best neutral as to the impact on bidders' share values. Generally, he did not believe that the value of takeovers to bidders had been firmly established.

In addition to encouraging takeover transactions through deregulation, the economic subcommittee has recommended a reduction in the costs of such transactions by limiting defensive tactics of targets. 2/ Such reduced costs would be designed to promote takeover activity. The thrust of the subcommittee's analysis in this area is that the number of acquisitions goes down as their costs go up. If the costs go up, "all corporations that are potential targets will trade for less in the market because their value as future acquisitions will be less."

2/ Members of the subcommittee as well as Mr. Baxter distinguished between defensive charter or by-law provisions and actions taken in response to a specific bid. They would limit the latter, but not necessarily the former, as the market would already have valued the target company's shares in the former.

The economic subcommittee would propose the following as an initial recommendation:

Possible Recommendation

(2) As the free transferability of control of public issuers is economically beneficial to shareholders of bidders and target companies, measured by increased market value of such companies' equity, the regulatory scheme should have as its object the encouragement of such transfers through minimized restrictions and costs on bidders, imposing only those obligations that are necessary to ensure confidence in the securities markets and equitable treatment of the smallest investors.

A second and alternative approach to the economic issues in this section would reflect the view that the economic data is problematic. Some on the Committee, as well as several commentators, do not agree that substantial economic benefits of takeover activities have been conclusively established. Short term market price increases, the argument goes, are not the appropriate basis for concluding that takeovers provide economic benefits of such substance as to adopt regulation to promote such transactions. Some also have suggested that the essence of a free market is the auction market, and that regulation should provide reasonable opportunity for competing bids. Finally, others believe the principal basis for determining the macro-economic issue of whether takeovers are beneficial involves a long term evaluation of the economic soundness of the acquisition, as measured by the operations, conditions and productivity of the combined enterprises.

In addition to those taking issue with basic premises of the subcommittee, others have challenged the analysis of data or methodology of research. Some suggest that the subcommittee has overstated its data. Others argue that the subcommittee has failed to account for increases in market price for shares of target companies that have successfully defended against hostile bids. (E.g., Kidder, Peabody & Co., Inc., Summary of Defeated Hostile Tender Offers, 1973-1982.)

The Committee may decide that on the strength of the evidence presented there is not an adequate basis for determining that takeovers are either beneficial or detrimental to the economy or the securities markets in general, or to issuers or their shareholders, specifically. Consistent with this view, the Committee could answer the question of whether takeovers serve as a discipline of inefficient management, or cause management to emphasize short-term results at the expense of long-term growth, by noting that one or the other of these effects is evidenced in various takeover situations, but that the Committee does not find either one of the effects exclusively or predominately true in all cases. Further, it could be noted that, as with other capital transactions, the fact that some takeovers prove beneficial while others prove disappointing is less attributable to the method of acquistion and more to the business judgment reflected in combining the specific enterprises involved.

If the foregoing paragraph reflects the Committee's position on the issues specified in paragraph II.A. of the Agenda, resolution of those issues might be stated as the following alternative recommendation.

Alternative Possible Recommendation

(2a) The purpose of the regulatory scheme should be neither to promote nor to deter takeovers; such transactions are a valid method of capital allocation, so long as they are conducted in accordance with the laws deemed necessary to protect the interests of shareholders and the integrity [and efficiency] of the capital markets.

The last approach to the economic issues in this area would reflect a point of view opposite to that of the subcommittee. Some of the Committee, as well as certain commentators, such as Control Data Corporation and Professor Lowenstein, believe hostile takeovers, particularly partial acquisitions, are socially and economically detrimental. If the Committee adopted that viewpoint it could propose a recommendation as follows:

Alternative Possible Recommendation

(2b) In that hostile takeovers have significant adverse social and economic implications, the regulatory scheme should restrict such transactions to the extent necessary to minimize such adverse consequences.

B. With respect to the issue outlined in paragraph II.B. of the Agenda of Issues, the Committee has reviewed the limited available literature concerning the relative effect of the factors listed below on the number and size of control transactions and has not reached any conclusions to date.

1. credit availability and policies
2. tax policies
3. antitrust policies
4. market conditions
5. general economic conditions
6. laws applicable to changes in control of regulated industries
7. accounting requirements
8. state takeover laws
9. federal securities laws
10. state takeover laws
11. antitakeover and fair price provisions

The sense of the Committee, however, appears to be that the first five of the listed factors are those that over time are the principal determinants of the level of acquisition activity and the structure of the acquisition transaction. The historical impact of federal securities law regulation warrants note perhaps less for its impact on the number or size of transactions and more for its effect on the structure of the control acquisition. 3/

3/ Note should be made that members of the economic subcommittee, as well as Assistant Attorney General Baxter, have expressed the view that regulation of tender offers is a major factor in determining the number of tender offers. These individuals have noted that since the adoption of the Williams Act, the number of tender offers that would have commenced would be significantly higher but for the regulation. There follows a table of the number of tender offers commenced since 1968.

Fiscal Year	Number of Tender Offers *	Fiscal Year	Number of Tender Offers *
1965	105 **	1974	105
1966	77 **	1975	113
1967	113 ***	1976	100
1968	115 ***	1977	162 ****
1969	70	1978	179
1970	34	1979	147
1971	43	1980	104
1972	50	1981	205
1973	75	1982	117

(Footnote continued on next page)

As exchange offers generally have had to be registered under the Securities Act of 1933 and thus required the usual processing and effectiveness of the registration statement prior to commencement of the tender offer, the attractiveness of exchange offers as compared to cash offers has suffered. The Committee has recommended that regulatory disincentives to the use of exchange offers be removed to the extent consistent with the Securities Act. On the other hand, open market accumulation programs are virtually unregulated and therefore have gained favor over other more regulated methods of gaining control. The Committee is considering certain regulation of open market programs which would lessen the regulatory incentives to resort to this mechanism of control acquisition.

The reemergence of antitakeover or fair price provisions in the past year may have significant effect on the number and kinds of transactions undertaken in the future and therefore may become a more significant factor.

(Footnote continued)

* Figures starting in 1967 represent tender offers undertaken.

** The Commission does not have figures on the number of tender offers prior to 1969. These figures were obtained from a study on "Tactics of Cash Takeovers Bids" prepared by Professors Samuel L. Hayes, III and Russell A. Taussig, 45 Harv. Bus. Rev. 135 (April 1967), which was submitted in 1967 to the Senate and House Committees holding hearings on the bill that became the Williams Act. The figures are based on a calendar rather than fiscal year. The Chairman of the Commission at that time advised the House Committee that the study "contains the most complete compilation of information currently available concerning cash and stock tender offers." See Hearings before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, House of Representatives on H.R. 14475, S.510, 90th Cong., 2d Sess. 21 (1968).

*** These figures were obtained from W.T. Grimm & Co. and also are based on a calendar year. We were advised by Grimm that they obtained this information from newsstories in the financial press and that the figures include tender offers for companies not subject to Section 12, but do not include tender offers for securities other than common stock.

**** In 1977, the federal government changed its fiscal year. Accordingly, this figure is based on an extended fiscal year from July 1, 1976 to September 30, 1977.

C. The economic effects of adopting a British type system and of restricting two-tier pricing and open market accumulation programs, issues that are raised in paragraph II. C. of the Agenda of Issues, are addressed in the discussion of the specific proposals.

D. As to the effects of an auction market for control, no conclusive evidence was presented to the Committee as to the actual effect of the potential for an auction on the number or size of takeovers. The Committee recognizes, however, that an auction of the target company increases a bidder's acquisition cost, and thus may deter initial bids. This deterrent effect is an intangible that the Committee finds has not been measured satisfactorily, even assuming it can be. The sense of the Committee was that if the regulatory system were revised to eliminate perceived incentives for second bidders not necessary for the protection of shareholders, it would be unnecessary to pursue further the measurement of the intangible effects of auction potential.

E. Both the Committee and the Senate Banking Committee identified the question of the effect of the takeover process on the availability of credit and its allocation in the economy. After careful consideration and taking into account the views of the economists and bankers on the Committee, and after a meeting with Federal Reserve Board Chairman Paul Volcker and members of his staff, the Committee appears to agree that transactions involving acquisitions of control do not result in a material distortion in the credit market, do not divert investment from new plants, do not limit consumers' ability to obtain credit and do not

otherwise deplete available credit. In reaching that agreement the Committee notes and agrees with the view expressed by Chairman Volcker that merger financing generally can be expected to have little lasting impact on the cost and availability of credit to other potential borrowers. Takeover transactions fundamentally involve a transfer of assets - not the absorption of new savings, and because the sellers of stock to an acquiring firm reinvest the proceeds, the capital is made available to others.

Possible Recommendation

(3) There is no material distortion in the credit markets resulting from control acquisition transactions, and no regulatory initiative should be undertaken to limit the availability of credit in such transactions, or to allocate credit among such transactions.

III. Basic Objectives of the Federal Securities Laws Applicable to Takeovers.

There appears to be general concurrence in the recommendations of the subcommittee on basic objectives that the regulatory scheme be based on the following premises.

Possible Recommendations

(4) Neutrality and Protection of Shareholders. Tender offer regulation should not favor either the bidder or the target, but should aim to achieve a reasonable balance while at the same time protecting the interests of shareholders and the integrity of the markets.

(5) National Market. Tender offer regulation should recognize that tender offers take place in a national securities market.

(6) Innovation. Tender offer regulation should not unduly restrict innovations in tender offer techniques. These techniques should be able to evolve in relationship to changes in the market and the economy.

Scope of Regulation. Even though regulation may restrict innovations in tender offer techniques, it is desirable to have sufficient regulation to insure the integrity of the markets
(7) and to protect market participants against fraud, nondisclosure of material information and the creation of situations in which a significant number of small shareholders may be at a disadvantage to market professionals.

Relationship to Other Legislative Objectives.

(a) State Tender Offer Law. State regulation of tender offers should be confined to "local" companies -- for example, those
(8) with more than 50% of their shares held within the state of incorporation, no listing on a national securities exchange, and outstanding "float" less than a certain size.

Note: One Committee member questioned the appropriateness and the necessity of the Committee's defining "local companies".

(b) State Regulation of Public Interest Businesses. Federal tender offer regulation should not preempt traditional state regulation of banks, utilities, insurance companies and similar businesses.

(c) Federal Regulation. Tender offer regulation should not override federal regulation of banks, broadcast licensees, railroads, ship operators, nuclear licensees, etc.

(d) Relationship with Other Federal Public Interest Regulation. Tender offer regulation should not be used to achieve antitrust, labor, tax, use of credit and similar objectives. Those objectives should be achieved by separate legislation or regulation.

Coordination with State Corporation Law. Except to the extent necessary to eliminate abuses or interference with the intended functioning of federal tender offer regulation, federal tender
(9) offer regulation should not preempt or override state corporation law. Essentially the business judgment rule should continue to govern most tender offer activity.

Elimination of the Present Bias Against Securities Tender Offers.

Cash and securities tender offers should be placed on an equal
(10) regulatory footing so that bidders, the market and shareholders, and not regulation, decide between the two.

(11) Restriction of Periodic Abuses. The evolution of the market and innovation in tender offer techniques may from time to time produce abuses. Tender offer regulation should be flexible enough to allow the SEC to deal with such abuses as soon as they appear.

An issue raised under paragraph III.C. of the Agenda of Issues that may require more explication is whether auctions or the opportunity for management to find alternative takeover partners should be an objective of the regulatory scheme. As noted in the discussion of the economic issues, the economic subcommittee and Mr. Baxter urged the Committee specifically to limit the ability of an auction to take place because of the impact of auctions on the cost of individual tender offers. Other commentators, however, most notably Professor Lowenstein, NASAA and Messrs. Elam and Tobin, argued the position that shareholders are best served where the price paid for the shares in a control acquisition is subject to market competition, i.e. auction, and that, particularly in partial transactions, management has an obligation to consider preferable alternatives to the acquisition and/or the terms of acquisition proposed.

At its April meeting, when it initially discussed this issue, the Committee indicated it was not prepared to recommend the opportunity for an auction as a regulatory purpose. The Committee noted that a system with a minimum offering period would permit auctions to a limited degree and that a system designed to cause an auction of the issuer may serve to limit the number of takeovers undertaken. Given these views, it appears that the Committee is prepared to accept the auction potential as a by-product but not an objective of a system with a minimum offering period.

IV. Regulation of Acquirors of Control

A. With respect to the issues raised in paragraph IV.A. of the Agenda of Issues there appears to be a general consensus that, to the extent consistent with the Securities Act of 1933 and the protection of investors, the regulatory disincentives to undertaking an exchange offer should be reduced. The Committee anticipates such a reduction would encourage greater use of securities in single step transactions. The following recommendations are intended to place exchange offers on the same expedited timetable as cash offers.

Possible Recommendations

(12) The concept of integration of disclosure under the Securities Act of 1933 and the Securities Exchange Act of 1934, previously effected by the Commission in securities offerings for cash, should be extended to exchange offers.

(13) Bidders should be permitted to commence their bids with a registration statement and receive tenders prior to the effective date of the registration statement. Prior to effectiveness, all tendered shares would be withdrawable. Effectiveness of the registration statement would be a condition to the exchange offer. If the final prospectus is materially different from the preliminary prospectus, the bidder would be required to maintain, by extension, a 10-day period between mailing of the amended prospectus and expiration, withdrawal and proration dates. This period would assure adequate dissemination of information to shareholders and the opportunity to react prior to incurring any irrevocable duties.

B. The issues set forth in paragraphs IV.B.1 and 3 of the Agenda of Issues have not, in certain instances, been addressed specifically in the various subcommittee reports. On the basis of Committee meeting discussions, however, there seems to be little sentiment for a substantial overhaul of the current disclosure requirements, although various Committee members have indicated a concern for boilerplate disclosures and complexity of the documents. The Committee may want to include the following recommendation.

Possible Recommendation

(14) The Commission should review its disclosure rules and practices to eliminate unnecessary or duplicative requirements, as well as inordinately complex or confusing disclosures. The Commission's rules should require a clear and concise statement of the price, terms and key conditions of the offer. In addition, the Commission should amend its rules to permit inclusion of the key conditions in its tombstone announcements.

With respect to the issues in paragraph IV.B.2 of the Agenda of Issues, the Committee's views are set forth under topic IV.C. of this summary.

With respect to the specific inquiries listed in IV.B.3, including issues of pro forma information, accounting treatment, and tax disclosure, there appears no general support for a change to existing requirements. Two possible recommendations have been suggested.

Possible Recommendations

(15) Projections or asset valuations provided by the target must include disclosure of the principal supporting assumptions provided to the bidder by the target on the grounds that without such information the projections or valuations have little meaning.

(16) The Committee agrees in principle with the objective of putting bidders on an equal information footing (at least to the extent that inequalities are due to selective disclosure by the target and not due to better research by some bidders). To this end, the Committee believes there should be an elimination of the ability of target company management to supply one bidder with substantial internal documentation and analysis, while another bidder may be restricted principally to information in the public domain. The Committee, however, does not believe, based on its own experience, that it is feasible to construct a regulatory system that would result in equal disclosure and is thus not recommending the adoption of a requirement providing for equal disclosure of information to all bidders.

NOTE The Committee may want to discuss the differences in the British system which, according to Messrs. Hignett and Lee, appear to permit a requirement for equal disclosure to all bidders to be effective in the Takeover Code.

Except for the recommended requirement to disclose underlying assumptions (15), the sense of the Committee with respect to the disclosure by the acquiror of target company projections seems to be that Rules 10b-5 and 14e-3 under the Exchange Act are sufficient for such purposes, and no recommendation is necessary with respect to paragraph IV.B.3.d. of the Agenda of Issues.

The Committee has considered the issue of pre-commencement review of tender offer documents by the Commission. There appears to be a general consensus that this would not be beneficial.

The joint subcommittee report addressed the issue of access to shareholders set forth in paragraph IV.B.4 of the Agenda of Issues. There appears to be a general Committee consensus that the following recommendations be made in the final report.

Possible Recommendations

(17) The Commission should continue its efforts to facilitate direct communications with shareholders whose shares are held in street name.

(18) The Commission should require under its proxy and tender offer rules that target companies make available to an acquiror, at the acquiror's expense, shareholder lists and clearinghouse security position listings, within 5 calendar days of a bona fide request by a bidder who has announced a tender offer or proxy contest. The Commission should consider prescribing standard forms (written or electronic) for the delivery of such information. The Committee believes the current rules have failed to assure that shareholders have speedy and complete dissemination of information of the acquiror.

With respect to the issue set forth in paragraph IV.B.5, the Committee has received only incidental information concerning technological developments, and to date has not identified any specific recommendations.

The joint subcommittee has proposed several recommendations for changes with respect to the issues raised relating to the Schedule 13D reports in paragraph IV.B.6. There appears to be a general consensus on the Committee that the 10-day window between the acquisition of a 5% interest and the required 13D filing presents an opportunity for abuse, as buyers "dash" to buy as many shares as possible between the time they cross the 5% threshold and the time they are required to file the Schedule 13D. As a result most Committee members appear to agree that the final report should include the following recommendation to cure such abuse. 4/

Possible Recommendation

(19) The Schedule 13D would continue to be required to be filed within 10 days of the date on which the buyer acquires more than 5% of the target company's shares. Once the 5% threshold acquisition has been reached, however, no additional purchases of the target company's shares may be made until 48 hours after the Schedule 13D has been on file. For subsequent purchases Schedule 13D would continue to be amended as current law provides.

4/ Other recommendations that would result in 13D changes are set forth as alternative proposals for regulation of open market accumulations. (See Recommendation 34c).

There appears to be a consensus that the required disclosure for Schedule 13D is generally material to shareholders. To date, the Committee has not identified a need for revision of the disclosure requirements or a need to require the filing of the schedule in connection with preliminary purchases that are undertaken as an intended control acquisition.

The issues outlined in paragraph IV.C. and D. (Terms of the Acquiror's Offer and Approval of Acquiror's Shareholders) have evoked the broadest range of views and a number of alternative proposals for the final report. There appears to be general consensus as to the following specific issues:

Possible Recommendations

(20) Except to the extent there already exists such a requirement in a particular context, the price paid by an acquiror unaffiliated with the target company should not be required to be "fair" nor should federal law provide for state law-type appraisal rights.

(21) All shareholders whose shares are purchased in a tender offer should be entitled to the highest per share price paid in the offer.

(22) There should be a minimum offering period. [There are a number of suggestions as to the appropriate period. It should be noted that the Committee has not addressed the issue of a minimum proxy solicitation period.]

(23) Fundamental fairness requires that the minimum offering period, withdrawal period and proration period be long enough to permit a reasonably diligent shareholder - institutional or individual - to receive offering materials and to make an informed investment decision.

(24) During the minimum offering period there should be unlimited proration and withdrawal rights.

(25) Competing offers should not trigger mandatory extensions of the expiration, withdrawal or proration dates of other offers or reopen withdrawal rights of other offers. To provide otherwise deprives the initial bidder of the advantage of speed and benefits of its initiative, tips the balance in favor of competing bidders, and introduces excessive confusion and gamesmanship into the process.

(26) All time periods should be defined in terms of calendar days.

(27) The takeover process should not be permitted to become so complex that it is understood only by investment professionals.

(28) "Commencement" of a tender offer would continue to be determined by present rules, and time periods would continue to run from that date.

(29) Regulations should be revised to require that the offering document be mailed within seven days of commencement by announcement.

(30) Tender offer reply forms should be standardized to the extent possible to facilitate handling by the regular departments of brokerage firms, banks and depositaries.

(31) Voluntary extensions may be made by the offeror with any type of offer at any time before the commencement of the first trading day after the expiration date of the offer.

(32) Current prohibitions of the purchase by a bidder of target company shares other than under the offer should be continued.

(33) Approval by shareholders of an acquiror with respect to an acquisition should continue to be an internal matter between shareholders and management, subject only to applicable state law.

The joint subcommittee has proposed limitations on open market accumulation programs both to assure that shareholders of the target company share in the control premium and to provide shareholders the protections of the tender offer process. The joint subcommittee has proposed to include the following recommendation in the final report.

Possible Recommendation

(34) No person may purchase voting securities of an issuer if, immediately following such purchase, such person would own more the 15% of the voting power of the outstanding voting securities of that issuer, unless such purchase were made (i) from the issuer directly, (ii) pursuant to a tender offer, or (iii) in a transaction involving a block of stock held by the seller for more than two years.

An alternative recommendation reflecting concerns about the definition and open-endedness of exception (iii) was proposed at the May Committee meeting.

Alternative Possible Recommendation

(34a) No person may purchase voting securities of an issuer if, immediately following such purchase, such person would own more than 15% of the voting power of the outstanding voting securities of that issuer, unless such purchases were made pursuant to a tender offer. The Commission should be given exemptive power with respect to this requirement.

Several Committee members, as well as certain commentators, notably Messrs. Baxter and Icahn, have expressed concern that these recommendations would significantly impede changes in control activities to the detriment of shareholders at large and could adversely affect the efficiency and liquidity of the secondary markets. These individuals therefore would propose the following:

Alternative Possible Recommendation

(34b) There should be no threshold of ownership above which the method of additional accumulation would be limited to the tender offer. If, however, such a threshold were adopted, it should be roughly 30-40%.

Others on the Committee have suggested that the 15% threshold is too high and therefore will do little to prevent creeping tender offers or to provide shareholders with the protections intended to be provided in change of control transactions. Concern is also expressed that the 15% threshold is too complex and would, in many cases, also fail to enable targets and the market to adjust and react to non-tender offer takeover attempts. As an alternative to recommendations 34 and 34a, these members would propose to recommend as follows:

Alternative Possible Recommendation

(34c)

a. A buyer who purchases other than through a tender offer must file a 13D before crossing 5%. This 13D must disclose intention to cross 10% or to solicit proxies. This disclosure would be made by checking a box so that there could be no uncertainty as to whether the disclosure was in fact made.

b. If the initial 13D does not disclose intention to cross 10% or solicit proxies, then neither could be done until 180 days after amending the 13D to disclose such intent.

c. Whether or not the initial 13D discloses intention to cross 10%, the buyer must not cross 10% until 60 days after the 13D discloses intention so to do. This will give the market time to react and the target time to take those steps that the board, in the exercise of its business judgment, deems appropriate to protect shareholders.

d. The present requirement for amending a 13D to disclose each 1% addition to a 5% holding should be strengthened to make it clear the it must be done forthwith on the day following the purchase.

e. A 60-day waiting period would not be required before crossing the 10% threshold if purchases over 10% were by tender offer for all the outstanding shares.

f. To further inhibit creeping tender offers and to discourage lockups, a tender offer by a bidder who has, or has the right to acquire, more than 10% of the stock of the target must be open for 60 days instead of the normal 30 days.

In connection with certain of these alternative recommendations, there appears also to be support for two derivative or related recommendations.

Possible Recommendations

(35) The Committee encourages the SEC and the accounting profession to explore the possibility of making equity accounting available to shareholders at the 15% ownership level [or at any other level that is proposed under recommendation (34)].

(36) The Committee encourages the SEC to study means of strengthening the concept and definition of group or concerted activity, particularly in the context of "investment leadership" where market professionals follow the lead of other investors and in the context of independent acquisitions by certain investors who have been in actual communication.

The joint subcommittee does not believe that the regulatory scheme should distinguish among any and all, partial, two-tier priced and two-step offers. The joint subcommittee report analyzes the issue in the context of the various methods for changes in control which include the following:

(i) Unitary transactions at a single value,

(ii) Unitary transactions at differing values,

(iii) Two-step transactions at a single value,

(iv) Two-step transactions at differing values,

(v) Partial acquisitions, and

(vi) Open market purchases.

The joint subcommittee report suggests that there is little debate that unitary transactions are fair and equitable, even when they involve components differing in values, so long as all shareholders have equal access to each component. Even the British, who confine acquisitions primarily to the unitary variety, have determined that it is appropriate to permit shareholder choice among different types of consideration of different values.

The joint subcommittee report asserts that two-step acquisitions, whether at single or differing values, as a practical matter are more favorable for target shareholders than partial offers with no second step. That is because the second step of such transactions, while perhaps at a lower value than the first step, normally is at a premium to the unaffected secondary market absent any second step. The second step must also meet state law standards of fairness, and appraisal rights are usually available. Thus, if partial offers are deemed acceptable, the joint subcommittee report asserts, it is not consistent to restrict two-step offers on grounds of equity to target shareholders.

The joint subcommittee report states that the preservation of partial tender offers is important to the working of the economy and that there are many valuable roles for partial offers and partial ownership, including.

(i) Allowing companies to invest in one or more industries with more limited financial exposure than if the ownership were 100%;

(ii) Facilitating technology exchange relationships;

(iii) Permitting change of control and reducing management entrenchment in large companies;

(iv) Facilitating private direct investment, such as venture capital;

(v) Acknowledging the common practices of suppliers of foreign capital in the United States; and

(iv) Allowing acquirors to get to know a potential acquiree over time, with a view to moving to 100% ownership.

If an investor creates additional value in the partially owned company through the control relationship, such values also accrue to the remaining shareholders.

Adoption of a British type system (i.e., (i) restrictions on open market purchases above 15%; and (ii) the obligation to make an offer for all shares if the amount owned or sought exceeds 30%) would in effect preclude significant partial offers, and would require share purchases above a defined threshold to be accomplished through a tender offer for all shares. An essential corollary to a British system would be the elimination of supermajority and "fair value" charter provisions, and the adoption of a "non-frustration" doctrine to govern the actions of target management.

The joint subcommittee report concludes that, while the British system has considerable attactions, the proposals of the joint subcommittee, in particular those reforms relating to open market purchases and the preservation of partial offers, represent an evolutionary development in the U.S. system which is preferable to the more radical changes suggested by the British system. The joint subcommittee recommends, however, that if its changes are adopted, such changes be reviewed at a future date to determine whether they have had the desired effect and if the tender offer process is functioning well. At that time, it may be appropriate again to consider the incorporation of some features of the British system into our own.

The joint subcommittee report takes the position that the key to fairness of two-tier offers is whether all shareholders have an equal opportunity to participate in the initial prorationing. While there may have been doubts about that equality of opportunity when 10-day prorationing prevailed, the joint subcommittee believes that the 30-day proration period provides that equality.

It is also unrealistic to try to enforce equal value provisions for the second tier of a transaction involving securities of the acquiring company rather than cash. Values of securities can fluctuate significantly during even the brief course of an offer in response to general market conditions and to the particular circumstances of the issuing company. The value of securities by comparison to cash also differs for each shareholder in relation to his own tax circumstances and to his perspective on the long-term outlook for the securities. A similar argument applies to transactions involving two different types of securities.

The joint subcommittee report indicates that the frequent use of two-step acquisitions resulted in large measure from a now abolished rule permitting 10-day prorationing and from the difficulty of using cash and securities simultaneously in a tender offer. Because of the reforms recommended with regard to the timing of offers (i.e., 30-day prorationing) and with regard to rapid use of securities in exchange offers, the subcommittee believes that, in the future, partial tender offers with a view to a second step will occur less frequently. Concerns about two-step acquisitions should thus be largely ameliorated.

The joint subcommittee report states that requiring disclosure of the second step of an acquisition at the outset of the first step is unworkable because, among other reasons, not all the factors on which a buyer might decide to proceed with a second step are known at the outset. The joint subcommittee report also states that prohibitions or restrictions on second-step mergers are too drastic a remedy for the scope of the problem suggested. The flexibility to proceed or not to proceed with follow-on mergers is important to the working of the system.

If the Committee agrees with the views of the joint subcommittee with respect to partial, two-tier priced and two-step offers, it may wish to include a recommendation to the following effect.

Possible Recommendation

(37) The regulatory scheme should not contain restrictions specifically designed to inhibit or prohibit partial, two-tier priced or two-step transactions.

Various members of the Committee have taken strong issue with the joint subcommittee's recommendation that there be no restriction on partial offers and two-tier pricing. These members contend that given the proposals to equalize cash and exchange offers, particularly if non-tender offers continue to be permitted as under alternative recommendation 34c, there is no reason to preserve partial offers or two-tier pricing. These

members suggest that in many cases such offers are coercive and unfair and that they have led to a number of tender offer practices that have raised public and Congressional questions as to the whole process. If the Committee adopts the views of these members it may choose to make one of the following alternative recommendations:

Alternative Possible Recommendation

(37a) Partial tender offers and two-tier pricing should be prohibited. Combination, package, two-step and similar offers where the cash and securities (first step and second step) are substantially (not necessarily exactly) equal would not be prohibited.

An alternative to outright prohibition of partial and two-tier priced transactions that has been discussed would provide a regulatory incentive for any and all offers and combination, package, two-step and similar offers where the consideration is substantially equal. The incentive would be in the form of a shorter minimum offering period than that required for partial or two-tiered offers. The longer offering period for partial or two-tiered offers would give shareholders and management additional time necessary to understand the more complex investment decision.

Alternative Possible Recommendation

(37b) The minimum offering period for an offer for less than all the outstanding shares of a class of voting securities, or for an offer for all the outstanding securities of a class of voting securities in which the consideration to be paid to each shareholder for his shares will not be substantially equivalent, shall be 14 calendar days longer than that prescribed for all other offers.

Mr. Bator, one of the commentators at the June 2 meeting, while favoring adoption of the British type system, i.e., requiring a control person generally to offer to buy all shares, and restricting management's

ability to frustrate a tender offer, likewise suggested that if the Committee were unwilling to adopt such a system, that it provide an incentive to acquire all shares. The incentive proposed by Mr. Bator would be to provide British type limits on frustration of an offer, where the offer were for all the shares.

Alternative Possible Recommendation

(37c) If an offer is made for all the outstanding shares of a class of voting securities, management of the target should be prohibited from taking "extraordinary actions" to frustrate the offer.

The joint subcommittee report has proposed that the final report include the following recommendation as to the minimum offering period.

Possible Recommendation

(38) Tender offers should be required to be open at least 30 calendar days. The 30-day period is designed to be long enough for the needs of smaller shareholders and yet not so long as to discourage actual bidders from making tender offers. The offer would be required to remain open for at least five calendar days from announcement of any increase in the price or number of shares, or of any change in the material terms or conditions of the offer.

NOTE: 1. Changes in the final prospectus would require a 10 day extension (see recommendation 13). 2. The Committee was advised by representatives of reorganization departments that a five day extension was too short.

Some Committee members and certain commentators, including representatives of NASAA and the Massachusetts Securities Division, have recommended a longer period in order to facilitate management response. A number of commentators proposed sixty days. Professor Lowenstein suggested that six months was the appropriate period. This, he maintained, would assure

that tender offers are not generated simply by short term market fluctuations, a process which, in his view, leads to inordinate and unhealthy emphasis on immediate economic performance.

Other members of the Committee, as well as Assistant Attorney General Baxter, have suggested that if the minimum offering period is to be changed it should be shortened. Based on concerns that delay has deterred too many offers, they would recommend a return to the seven day, any and all offer and the 10 day partial offer, existing prior to the Commission's adoption of Rule 14e-1 under the Exchange Act.

With respect to prorationing, the joint subcommittee recommends that the proration and the minimum offering period be coterminus. The joint subcommittee does not believe, however, that prorationing need always be extended beyond the minimum offering period. Proration dates that are always coterminus with expiration dates create confusion because they do not permit the bidder or target company shareholders to evaluate their positions until the original offer is terminated and a new one commenced. This problem, the subcommittee believes, is particularly evident where there is a brief extension of an offer "to clean up" any remaining shares. The subcommittee thus proposes that the Committee recommend as follows:

Possible Recommendation

(39) In order to provide adequate response time to target shareholders, the proration period should be equivalent to the required minimum offering period. If the offer were extended beyond the original minimum offering period, the proration period would not also be required to be so extended. Proration rights, however, would be required for at least the five calendar days from announcement of an increase of the price or number of shares or of a change in the material terms or conditions of the offer. If additional proration rights are so provided, multiple proration pools should not be created.

The joint subcommittee proposes that withdrawal rights be coterminus with the required minimum offer period and the initial proration period. No extension of such period would be required in connection with the commencement of competing offers or with changes in the offer that do not disadvantage shareholders who have already tendered.

Possible Recommendation

(40) The period during which tendering shareholders will have withdrawal rights should be the same length as the minimum offering period. The withdrawal period will be extended only if there is a negative change in the terms of an offer that would disadvantage a shareholder who has tendered before such change.

Serious concern has been expressed as to the complexity that would result from recommendations 39-40. Some Committee members have called for a simpler scheme, i.e. a system that would specify a minimum offering period and provide for prorationing and withdrawal rights throughout the offering period even as extended. These members argue that, as demonstrated by takeovers in the past several years, different dates of consequence in an offer create great confusion and that the proposals of the joint subcommittee would continue such confusion by permitting expiration of withdrawal rights prior to the expiration of prorationing. This would create a trap for the unsophisticated or unsuspecting shareholder and for those who have to rely on the mails to effect a tender. Further, to provide that shares may be accepted on a first-come, first-served basis after a certain period in the offer, while requiring extension of prorationing in the event of a material change in the offer, could result in tendering shareholders not knowing at the time of tender whether their shares will be accepted pro rata or first-come, first-served. An alternative recommendation deriving from this view is as follows:

Alternative Possible Recommendation

(40a) Prorationing and withdrawal rights should be required throughout the offer. Where there are no competing bids, however, a bidder would be permitted to extend its offer without extending prorationing or withdrawal rights, so long as the bidder is irrevocably committed to purchase the shares tendered and not withdrawn on the initial expiration date.

V. Regulation of Opposition to Acquisition of Control.

A. There appears to be a consensus that the final report contain the following general recommendation with respect to the application of the business judgment rule to takeover activities.

Possible Recommendation

(41) The Committee supports a system of state corporation laws and the business judgment rule. No reform should undermine that system. Broadly speaking, the Committee believes that the business judgment rule should continue to apply to decisions made by corporate management, including decisions which may alter the likelihood of a takeover.

Various Committee members and several commentators have suggested that reliance on the business judgment rule in general is inconsistent with advisory votes and shareholder approval requirements for share issuances and block repurchases. Those raising this issue have various solutions. Some suggest that only the business judgment rule should apply to takeover activities; others suggest that there be superimposed a general limitation on management's ability to frustrate an offer.

B. With respect to charter and by-law provisions requiring action by supermajority vote, a majority of the Committee appears to favor the recommendations of the joint subcommittee. These are as follows:

Possible Recommendation

(42) Companies should be permitted to adopt provisions requiring supermajority approval for change of control transactions, but the ability to achieve such a level of support must be demonstrable.

a. Any company seeking approval of a charter or charter amendment which requires (or could under certain circumstances require) the affirmative vote of more than the minimum specified by state law would be required to obtain that same level of approval in passing the amendment initially.

b. Where the charter provides a formula for the required level of approval, which level cannot be determined until the circumstances of the merger are known, the formula shall be limited by law so as to require a vote no higher than the percentage of votes actually ratifying the charter provision. Re-ratification should be required every three years.

c. For a nationally traded company which has adopted a supermajority provision prior to the date of enactment of this recommendation, and for a "local" company with a supermajority provision which becomes nationally traded at a later date, shareholders must ratify the company's supermajority provision within three years after such date, and continue to re-ratify such provision every three years thereafter.

Those on the Committee concerned about partial and two-tier priced offers disagree with this recommendation. They contend that unless partial and two-tiers offers are substantially restricted or prohibited, there should be no interference with an issuer's attempt to protect against such offers in its charter or by-laws.

C. The joint subcommittee also has suggested that shareholders' views be obtained once a year with respect to control-related policies of an issuer. It proposes that the following recommendation be included in the final report.

Possible Recommendation

(43) The SEC should designate certain change of control related policies of corporations as "advisory vote matters" for review at each annual stockholders' meeting for the election of directors and for disclosure in the proxy statement.

a. Matters Covered. Advisory vote matters should include:

i. Supermajority provisions. Charter provisions requiring more than the statutorily imposed minimum vote requirement to accomplish a merger, including provisions requiring supermajority approval under special conditions (e.g., "fair value" and "majority of the disinterested shareholders" provisions); [Once outright federal restrictions on supermajority provisions are enacted (see Recommendation 42), however, there would be no further need to classify such provisions as advisory vote matters.]

ii. Disenfranchisement. Charter provisions (other than cumulative voting and class voting) that abandon the one-share, one-vote rule based on the concentration of ownership within a class (e.g., formulas diluting voting strength of 10% shareholders, and "majority of the disinterested shareholder" approval requirements);

iii. Standstill agreements. Agreements that restrict or prohibit purchases of the company's stock by a party to the agreement; and

iv. Golden parachutes. Arrangements that provide change of control related compensation to company managers or employees.

b. Proxy Statement Disclosure. Companies should be required to disclose all advisory vote matters in a "Change of Control" section of the proxy statement.

c. Vote. Shareholders should be requested to vote on an advisory basis as to whether they are or continue to be in favor of the company's policy with respect to the advisory vote matters disclosed in the proxy statement. The board would not be bound by the results of the advisory vote but could, in its own judgment, decide whether company policy should be changed on the advisory vote matters.

A number of Committee members have questioned the efficacy of the advisory vote concept particularly in the case of standstill agreements or charter provisions where unilateral action by the board of directors may not be possible. Additional concern has been expressed that the proposal for advisory votes is a fundamental change in general corporate governance principles and a substantial interference with a system of state corporate law. These members would eliminate all proposals concerning advisory votes.

D. There appears to be general support for the joint subcommittee's approach to the issue of golden parachutes, and its recommendation that the problem be treated primarily as one of disclosure.

The joint subcommittee suggests that golden parachutes do not in fact deter takeovers, as they are a small fraction of an acquisition price. Also, golden parachutes can have the beneficial effect of retaining qualified managers, of keeping their attention on running the business, and of aligning management's interests more closely with those of shareholders when an offer for the company is at hand. While the joint subcommittee shares the public concerns that such forms of compensation can present the appearance of self-dealing by management and of failure to place the interests of shareholders foremost, it is equally wary of any attempt to restrict the free bargaining of management employment agreements by federal regulation.

Possible Recommendation

(44) a. During a Tender Offer. The board shall not adopt contracts with "change of control" compensation once a tender offer for the company has commenced.

b. Disclosure. The issuer should disclose the terms and parties to contracts or arrangements that provide for "change of control" compensation in the Change of Control section of the annual proxy statement.

c. Advisory Vote. At each annual meeting, shareholders would be requested to vote, on an advisory basis, as to whether the company should continue to provide "change of control" compensation to its management and employees. The board would not be obligated by the results of the vote to take any specific steps, and the outcome of the vote, in itself, would have no legal effect on any existing employment agreement.

Those taking issue with the concept of advisory votes, would suggest the deletion of paragraph c. in recommendation (44).

E. There appears to be basic agreement with the joint subcommittee's proposed recommendations with respect to affirmative defensive maneuvers.

Possible Recommendations

Self Tenders

(45) a. In general, target company self tenders should not be prohibited during the course of a tender offer for the target by another bidder.

b. Once a third party tender offer has commenced, the target company should not be permitted to initiate a self tender with a proration date earlier than the proration date of any existing tender offer.

c. Target companies which engage in self tenders should be required to return unpurchased shares to tendering shareholders promptly (within seven days) after prorationing.

Pac-Man

(46) Inasmuch as there are sufficient and justifiable reasons for the use of the Pac-Man defense, there should be no restrictions on its use generally. The SEC may wish to consider, however, restrictions on the employment of a Pac-Man defense once a bidder has made a cash tender offer for 100% of a target.

Crown Jewels

(47) The business judgment rule should continue to govern disposition of significant assets.

Legups and Lockups

(48) Contracts for the sale of stock or assets to white knights should continue to be tested against the business judgment rule.

VI. Regulation of Market Participants

There appears to be a general concurrence with the recommendations of the subcommittee on market participants.

A. Short, Hedge and Multiple Tendering

Such practices are generally available only to the market professionals, and as a result are perceived as giving unfair advantage to that group. Such perception risks undermining public confidence in the integrity of the securities market.

Possible Recommendation

(49) a. The Commission should continue the current prohibition on short tendering set forth in Rule 10b-4. To insure the effectiveness of that provision the Commission should also prohibit the practice of hedge and multiple tendering.

b. In furtherance of the policy goals of the foregoing, the Commission generally should require in a partial offer that all shares tendered pursuant to a guarantee be physically delivered, rather than permitting delivery of the certificates of the number of shares actually to be purchased.

B. Options

The subcommittee believes that for the purpose of determining "net long" for Rule 10b-4, short call option positions that are highly likely to be exercised (generally "in-the-money" options trading at parity) should be netted against the positions in the underlying stock.

Possible Recommendation

a. (50) Rule 10b-4 should prohibit the sale of a call option by a person who has tendered stock in a tender offer, if the exercise of the call option prior to the expiration of the tender offer would result in the seller being short stock needed to honor his tender. The Commission should consider the need for and feasibility of providing an exemption for "out-of-the money" call options or options trading at a premium where the seller does not reasonably know that at the time of expiration of the tender there is a high likelihood that the option will have been exercised.

b. Rule 10b-4 should prohibit the tender of stock in a tender offer if such tender would result in the seller being short stock needed to honor an existing "in-the-money" call option trading at parity. The Commission should consider the need to provide exceptions for option specialists and market makers.

c. The Commission should explore the effect of changing Rule 10b-4 to require persons exercising an option actually to receive the underlying stock before being able to tender those shares.

C. Depository Participation

Possible Recommendation

(51) Without commenting upon the technical aspects of the proposal, the Committee endorses the Commission's proposed Rule 17Ad-14 under the Exchange Act.