The Ohio Manufacturers' Association

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February 14, 1984

The Honorable Timothy E. Wirth
Chairman, Subcommittee on
Telecommunications, Consumer
Protection and Finance
U. S. House of Representatives
Room B-331
Rayburn House Office Building
Washington, D. C. 20515

Re: Response of Ohio Manufacturers' Association
To Your January 6, 1984 Letter on Tender Offers

Dear Chairman Wirth:

This letter is written in response to your January 6, 1984 letter to The Ohio Manufacturers' Association with reference to tender offers. We have asked our outside legal counsel, Vorys, Sater, Seymour and Pease, to prepare our full reply, which is found in their enclosed memorandum, with attachments, of even date. In this letter, we should like to summarize a key point made in the memorandum.

The central need — and it is a pressing one — is enactment of federal legislation expressly empowering the several states to regulate tender offers and control share acquisitions, so long as such regulation does not make it impossible to comply with federal securities regulation. In June, 1983, the National Association of Attorneys General adopted a resolution supporting such a statute. In December, 1983, the Attorneys General reaffirmed such resolution. Both actions were taken without a dissenting vote.

It has been state law, not federal law, that has reasonably slowed down hostile tender offers, providing the time for understanding by the average investor and the time for seeking competitive bids, perhaps from a locally oriented offeror. The thrust of the recommendations of the majority Report of the SEC Advisory Committee on Tender Offers is just the opposite — to speed up the process by express preemption of state law and by accelerating securities tender offers. The majority Report contemplates a wholesale takeover of state corporations and securities law at great cost to the average investor, workers, suppliers, local communities and state sovereignty. The majority Report is dead wrong.

The Supreme Court's 1982 MITE decision, as well as the recommendations of the majority Report, create the great need for the federal legislation expressly authorizing state regulation. The enclosed memorandum has attachments that include a draft of the legislation. As you will note, that draft deals with two criticisms of state regulation by:

1. Requiring any state hearing or required shareholder's vote to be completed within 60 days; and

2. Allowing only a single state (the state of incorporation of the target corporation) to take jurisdiction of a given tender offer or control share acquisition.

The attached memorandum demonstrates that such federal legislation would clearly be within the constitutional powers of Congress, which Congress used in enacting the McCarran-Ferguson Act to clarify state regulatory power over insurance. The legislation we propose is, however, unlike McCarran-Ferguson in that no federal legislation would be supplanted or prevented and no state regulation making it impossible to comply with federal securities regulation would be authorized. In this sense, the attached draft legislation is many times more modest than McCarran-Ferguson.

We should be pleased to supply further information or to meet with you or members of your staff.

Respectfully submitted,

THE OHIO MANUFACTURERS' ASSOCIATION

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February 14, 1984

MEMORANDUM

To: The Honorable Timothy E. Wirth, Chairman, Subcommittee on Telecommunications, Consumer Protection and Finance

From: Vorys, Sater, Seymour and Pease

Re: RESPONSE OF OHIO MANUFACTURERS' ASSOCIATION TO YOUR JANUARY 6, 1984 LETTER ON TENDER OFFERS

The Ohio Manufacturers' Association (which we represent) has asked us to reply, on its behalf, to your January 6, 1984 letter to them on tender offers.

Your letter raises a number of specific questions, but also requests additional discussion if we feel it is merited. Accordingly, we will begin this memorandum with a discussion of the historical place of tender offers and the history of federal and state regulation (Part I). We will then discuss what we believe are the key issues and what should be done about them (Part II). In conclusion (Part III), we will address most of the recommendations of the majority Report of the SEC Advisory Committee on Tender Offers.

I.
HISTORICAL PLACE OF TENDER OFFERS AND HISTORY OF FEDERAL AND STATE REGULATION

Background: The Three Means of Amalgamating Corporations and The Place of Tender Offers

An acquiring corporation may acquire or amalgamate another corporation by any one of three different means:

(1) Statutory merger or consolidation of an acquired corporation into the acquiring corporation.

(2) Purchase of assets of the acquired corporation.

(3) A tender offer to shareholders of the acquired corporation for outstanding shares of that corporation.

In any one of these means of acquisition, the acquiring corporation may use either cash or its own securities or both.

Statutory mergers and purchases of assets of a public company will always require -- under state corporation law -- consent of the acquired corporation's board of directors and a favorable collective vote by the shareholders of the acquired corporation. As a condition to the shareholders' vote, rules of the federal Securities and Exchange Commission and state corporations law require that a proxy statement with the utmost full and fair disclosure be supplied. Statutory mergers and purchases of assets are thus negotiated transactions between the boards of directors of the acquiring and the acquired corporations; shareholder approval by the collective vote of the acquired corporation's shareholders (after utmost full and fair disclosure to them) also serves to make the process orderly and rational.

On the other hand, a tender offer for a portion or all of the outstanding securities of an acquired corporation does not require approval of the board of directors of the putative acquired corporation, and a "hostile" tender offer is made over the objection of the board of directors of the putative acquired corporation (the "target"). Typically, there is NO negotiation. Furthermore, except in Ohio (under legislation adopted in 1982 and discussed later in this memorandum), the shareholders of the target have no collective vote. The process in a hostile tender offer is frenzied and coercive and can easily be irrational. Moreover, in a cash tender offer, the disclosure (again with the exception of the Ohio legislation enacted in 1982) is frequently fragmentary -- even though there is no negotiation.

Proponents of reasonable regulation of hostile tender offers believe that the disclosure should be roughly as good in a hostile tender offer as the disclosure in a statutory merger or purchase of assets (not worse, as is now usually the case) and that hostile tender offers should be slowed down (within reason) because --

(1) Shareholders and the board of directors of the target should have data and time to carefully evaluate and to search for and obtain better competitive bids, returning more money to shareholders of the target.

(2) Shareholders and the board of directors of the target need time and data to consider not only the impact upon their shareholders, but also the impact upon suppliers, workers, and communities. For example, a second or third bidder may, in addition to offering more money, indicate a greater concern for such other affected groups. In a statutory merger or sale of assets, these broader considerations can easily be weighed. In a hostile tender offer, only regulatory requirements of adequate disclosure and an adequate minimum time for tender offers to remain open supply this protection.

(3) As hostile tender offers become more and more complex (e.g., two-tier offers), adequate time and disclosure are necessary for the average investor to ascertain how his or her interests are best served.

Before 1964

Until about 1964, "hostile" tender offers (tender offers opposed by management of the target) were virtually unknown in the United States. Offerors would not make a tender offer unless it was "friendly" (favored by the management of the target).

1964-1968

Around 1964, hostile tender offers began to appear. The only federal securities regulation provision that was applicable to cash tender offers was Rule 10b-5, the general antifraud provision of the federal Securities Exchange Act of 1934. Offers were kept open for only a few days, and "partial" cash tender offers (offers for less than 100% of the shares of the target) were usually "first come, first served"; this led to extreme time pressures of "Saturday night specials." Under state law, including that of Ohio, there were no registration or other provisions applicable to cash tender offers.

"Securities" tender offers (a tender offer involving securities of the offeror as consideration for securities of the target) are now -- and always have been -- fully subject to the federal Securities Act of 1933. So far, the SEC has required that before the offeror commences the securities tender offer, the Securities Act of 1933 registration statement must be prepared, filed and become effective. To date, the registration statement required by the SEC has been a comprehensive one, meaning that disclosure on securities tender offers has been good, and the process for a securities tender offer has been slower for a securities tender offer than for a cash tender offer. This difference is appropriate for investor protection, because securities tender offers are inherently more complex and involve a variety of considerations. Cash tender offers are not subject to the Securities Act of 1933.

Enactment of the Williams Act in 1968

In 1968, the federal Williams Act was enacted, which, *inter alia*, added Sections 13(d), 14(d), and 14(e) to the Securities Exchange Act of 1934. Section 14(e) prohibits fraud or manipulation in connection with a tender offer and authorizes SEC prophylactic rules to prescribe means reasonably designed to prevent such fraud or manipulation.

Section 13(d) is an early warning system. Any person or group acquiring 5% or more of the stock of a listed or similar public company regulated by the SEC must file public statements of ownership.

Section 14(d) regulates tender offers for securities of listed or similar public companies regulated by the SEC. The regulation in Section 14(d) itself is minimal. Some disclosure is required. There are specifications about withdrawal rights, and Section 14(d) itself provides for limited pro rata treatment when there is a partial tender offer and more shares are tendered than the offeror is required to take. Under Section 14(d) itself, the minimum period during which the offer must remain open is minimal -- only seven or ten days. By rules adopted in 1979 by the SEC, the minimum period during which an offer is required by the Williams Act to remain open was extended to 20 business days. In 1982, SEC rules extended the proration period to the length of the offer.

Where, however, the tender offer is a securities tender offer rather than a cash tender offer, the Securities Act of 1933 has, to date, provided good disclosure and slowed the process down. To date, most tender offers have been cash tender offers.

Enactment of State Tender Offer Legislation

Beginning in 1968-69, Virginia and Ohio enacted state tender offer legislation. By 1982, about 35 states followed their lead. These state statutes were a reaction to the fact that the Williams Act itself required only a seven or ten-day period during which the offer must be open. The Ohio legislation was adopted with overwhelming support from labor and management.

State regulation in the area was logical, as states create corporations by chartering them. Aside from financial institutions, the federal government does not charter corporations.

The 1969 Ohio legislation is found in Section 1707.041 of the Ohio Revised Code. Section 1707.041 calls for hearings by the Division of Securities before a tender offer for an Ohio-chartered corporation (or a foreign corporation with specified substantial Ohio contacts) can begin. The hearings develop, in detail, the adequacy of disclosure. Under Section 1707.041, the hearings must be completed within sixty days after the offeror announces its intent to make a tender offer. In practice, the Division did not pass upon the fairness of offers. Rather the Division tested the disclosure and caused numerous and substantially improved disclosures to be made. It did not disapprove offers. Another effect of the Division's process was to encourage competitive bids for the shares of the target; in many cases, increased bids and enhanced returns for the target's shareholders were obtained.

The SEC itself has never played an active role in policing the disclosure in a tender offer (especially a cash offer). Its disclosure requirements for a cash offer are quite modest. The Williams Act does not provide for any hearing process. Furthermore, the SEC almost never brings an enforcement action during a tender offer. In light of the current federal budget deficits, the role of the SEC is unlikely to change. By contrast, in many states, there has been active experience in regulating tender offers, and state finances are sounder than those of the federal government.

Early Treatment of Constitutionality of State Tender Offer Regulation

Until about the mid-1970s, there were no serious constitutional challenges to state tender offer regulation.

Section 28(a) of the Securities Exchange Act of 1934 specifically preserves state regulation except to the extent that it conflicts with federal regulation. Generally speaking, this standard was interpreted to mean that state regulation would not be considered in conflict with federal regulation if the state regulation did not make it impossible to comply with the federal regulation. Under such an interpretation of Section 28(a), there was neither express nor implied preemption under the supremacy clause of the Constitution of the United States of America.

Arguments were also raised that state tender offer legislation constituted a prohibited unreasonable indirect burden on interstate commerce and was hence unconstitutional under the commerce clause.

In AMCA International v. Krouse, 482 F. Supp. 929 (S.D. Ohio, 1979), Judge Kinneary upheld Section 1707.041 of the Ohio Revised Code against both the preemption and the commerce clause arguments. Concerning the commerce clause, he held that the statute as applied had yielded considerable benefits to shareholders of Ohio corporations by encouraging competitive bids and that, furthermore, the statute as applied had not been unduly burdensome on offerors.

During this era, the attempts to get constitutional rulings knocking down state tender offer statutes were almost wholly unsuccessful. During this era, the United States Supreme Court decided Santa Fe Industries v. Green, 430 U.S. 462 (1977), which held that the primary law in the United States governing corporate transactions is state law. This is appropriate, of course, since the federal government charters almost no corporations aside from certain financial institutions. It is the states that charter corporations. Proposals for federal chartering have never gained any substantial support, the theory being that in our federal system of checks and balances, the most crucial questions on business structure and operation are to be left to the states to work out by experiment and experience. The federal securities statutes, though crucial, are designed only to set a limited number of minimum standards which must be met by everyone. The states are to be left free to add to the minimum framework, though they cannot, of course, impose requirements that make it impossible to comply with federal securities regulation.

The 1982 MITE Decision

In Edgar v. MITE, 102 S. Ct. 2629 (1982), the United States Supreme Court held the Illinois tender offer statute invalid as a prohibited unreasonable indirect burden on commerce. Only five of the nine Justices voted for this result, and Justice Powell (who supplied the fifth vote) made it clear in his concurring opinion that he concurred only on narrow grounds and that states have legitimate interests in regulating tender offers. Implied preemption was also argued, but fewer than five Justices found the Illinois statute to be impliedly preempted by the Williams Act.

In several respects, the Illinois statute was not as carefully drafted as Ohio Section 1707.041. There was no sixty-day limit upon hearings and, moreover, the hearing officer had authority to apply general fairness standards. Thus, it might have been possible to have distinguished MITE in determining the constitutionality of Section 1707.041, but subsequent lower federal court cases quickly extended MITE, making it clear that Section 1707.041 probably could not stand under existing judicial doctrine and federal statutes. Indeed, the lower federal court cases coming after MITE and extending it made clear that nearly all of the state tender offer statutes of the pre-MITE era are probably unconstitutional. This made the 60 calendar-day minimum periods of those statutes irrelevant and left the 20 business day period under the Williams Act rules as the sole minimum period. Please note that the Bendix-Martin-Marietta-Allied fiasco was played out in the Autumn of 1982 with no state tender offer statute being applicable. The accelerated time frame played a significant role in that fiasco.

The November, 1982 Ohio Legislation

In November 1982, legislation was enacted in Ohio (with only two or three dissenting votes in the entire General Assembly) to comply with MITE. Labor and management groups supported this legislation. The legislation amended Chapter 1701 of the Revised Code, the corporations statute. The key provision is new Section 1701.831 of the Ohio Revised Code. In brief, the new legislation requires a favorable shareholder vote before a control share acquisition can be consummated (though the offer may immediately be begun, subject to the condition of a favorable vote). This vote will normally invoke the SEC's proxy rules and thus require full and fair disclosure. The term "control share acquisition" includes, but is not limited to, tender offers.

The November 1982 legislation is carefully drafted to avoid MITE. The biggest protection is the fact that shareholder votes, rather than governmental hearings, are relied upon. Other distinguishing factors are as follows:

(1) Shareholders may, if they wish, amend the charter to take themselves out from under Section 1701.831. Consent of the board of directors is not needed.

(2) The shareholders vote must be completed within 50 days.

(3) The section is neutral between hostile and friendly tender offers, a situation not present in MITE or in Section 1707.041.

(4) The target's directors are legally bound to forward a bona-fide offer to shareholders for a vote. This offeror right is not present under federal law or in other states. This and other factors demonstrate an even-handedness between offerors and the target.

(5) Jurisdiction is limited to corporations which are incorporated in Ohio and have additional substantial Ohio contacts. In MITE, such was not the case, and such was not the case under Section 1707.041.

(6) Once the shareholders of the target have voted, the target's management will have helpful guidance concerning what the shareholders wish. That is the very object of the legislation -- let the shareholders have a collective vote in much the same way that they have a vote in the other two ways of amalgamating companies (statutory merger and purchase of assets). This contrasts with the concept of a governmental hearing that was at the heart of the earlier Ohio legislation.

It is believed that the November 1982 Ohio legislation is constitutional. However, there has been no judicial resolution of the question.

You will note that the 1982 Ohio statute slows the process down. Under the Williams Act rules, the minimum period is 20 business days (about 26-28 calendar days), while the Ohio legislation establishes 50 calendar days. The Ohio statute does not make it impossible to comply with federal law, as the Williams Act period is only a minimum.

Where federal regulatory bodies must approve, the relevant period is often more than 20 business days, and an offeror is always legally free to keep an offer open beyond the minimum time period.

To date, no other state has passed a statute similar to the 1982 Ohio legislation, though such a statute is being considered by the Wisconsin legislature. The MITE decision has cast an unhealthy chill upon this traditional area of state regulation.

The Resolution of the National Association of Attorneys General

The National Association of Attorneys General addressed this question at its June 1983 meeting. The Attorneys General, without a dissenting vote, passed a resolution calling for federal legislation expressly authorizing state regulation of control share acquisitions and tender offers, so long as such state regulation does not make it impossible to comply with federal securities regulation.

Attached is a copy of that resolution, as well as the memorandum of the proponent, Attorney General Celebrezze of Ohio. Appended to the memorandum is a draft federal statute that would implement the resolution. The resolution nicely states the interests involved -- the shareholders of the target, as well as those of workers, suppliers, local communities and state sovereignty. The Celebrezze memorandum demonstrates both the constitutionality and wisdom of the draft statute and notes two limits it would put on state regulation:

(1) Any state hearing or required shareholder vote must be completed in 60 days.

(2) Only a single state (the state of incorporation of the target corporation) could assert jurisdiction over any given control share acquisition or tender offer.

The draft statute was not specifically endorsed by the Attorneys General, but all discussion of the resolutions has always been focused on that draft statute.

The Attorneys General approved another, similar resolution (copy attached) at their general meeting in December 1983. Again, there was no dissenting vote.

The Majority Report of the SEC Advisory Committee on Tender Offers

In early 1983, the SEC announced the formation of an Advisory Committee to study tender offers. The membership was highly skewed. The academics were from the Chicago School. Most of the members were from the New York City area and most were active tender offer lawyers, investment bankers, or others making excellent profits from trading, turnover, and tender offers. The members were distinguished and should have been on any advisory committee, but the Committee was badly skewed to favor offerors, who of course want short minimum time frames and want to avoid competition when they make a tender offer. The Committee should have been twice as large, with labor leaders, state government officials such as Governors, lawyers favoring potential target corporations, and chief executive officers of potential targets also being highly represented. Though the subject of tender offers is arcane, it is an important one affecting all Americans, not just New York City investment bankers and tender offer lawyers.

There was immediate adverse reaction to the composition of the Committee by the Ohio Manufacturers' Association, this law firm, and others. Congressional leaders responded to these criticisms and two additional members were added -- Arthur Goldberg (a distinguished labor lawyer and a former Justice of the United Stated Supreme Court) and Jeffrey Bartell, a Madison, Wisconsin lawyer who had earlier served as Commissioner of Securities of the State of Wisconsin. It is significant that each of these lawyers issued strong dissents to the majority Report of the Advisory Committee.

In a letter dated February 1, 1983 to SEC Chairman Shad (copy reproduced in Advisory Committee Report), most of the members of the Senate Committee on Banking, Housing, and Urban Affairs admonished Chairman Shad that the SEC and its Advisory Committee should conduct a broad-based inquiry. Instead, as Mr. Goldberg said on page 5 of his dissent, "The report of the Advisory Committee makes no significant reference to the protection of the public interest."

The majority Report of the Advisory Committee advocates wholesale express preemption by Congress of state tender offer legislation and an acceleration of the process, especially as to securities tender offers. The 20 business day minimum would be left essentially unchanged, although 20 business days (26 to 28 calendar days) would be ever-so-slightly extended to 30 calendar days. In addition, a generic kind of federal corporations law would be introduced as to defensive measures. In short, the 50 to 60 calendar day minimum periods of state law are to be junked and the playing field lifted at one end, with potential targets on the low end. This result would be fine for tender offer lawyers and investment bankers specializing in tender offers, but bad for average shareholders, workers, suppliers, local communities and state sovereignty.

This action was taken after a thorough statement of the position taken in this letter by this firm and others -- both at public hearings and in writing. For example, this law firm made a 45 minute oral presentation to the Advisory Committee and submitted a comment letter (copy enclosed) of 10 single-spaced pages to them. The composition of the majority of the Advisory Committee made it clear how the majority Report would read.

The majority Report of the Advisory Committee has been heavily criticized for not responding to fundamental concerns. In "Regulation of Tender Offers: A Critical Comment," found in the Oct. 13, 1983 Review of Securities Regulation, Professor Lowenstein of the Columbia Law School faults the majority of the Committee for failing to recommend a slowing-down of the process for weeks or months so as to rationalize the process. In "Whatever Happened To State Law," also found in the Oct. 13, 1983 issue of Review of Securities Regulation, A. A. Sommer, Jr., a prominent Washington, D.C. securities lawyer and a former SEC Commissioner, sharply criticizes the Advisory Committee's majority Report as lacking in depth or breadth and for its recommended wholesale takeover of state law.

Arthur Goldberg (formerly a Justice of the United States Supreme Court), a member of the Committee, filed a long dissent to the majority Report of the Advisory Committee. Justice Goldberg noted that the Report does not deal with first principles; according to him, "The Report of the Advisory Committee makes no significant reference to protection of the public interest." Justice Goldberg proposes that upon the making of a hostile tender offer, there be a "cooling off" period (applicable to the offeror and the target) and that such an offer should be subject to votes by shareholders of the offeror and the target. His recommendation is fundamental and directly opposed to the central principles of the majority.

In short, the majority Report of the Advisory Committee is fatally flawed in the skewed nature of composition of membership and its stubborn refusal to come to grips with basic issues. The majority Report is thus not subject to any presumption of correctness; and upon examination, that majority Report recommends marching in the wrong direction. Congress should take charge and enact legislation of the type recommended by the Attorneys General. The longer time frames contemplated by state law produce better competitive bidding and more time for the average investor to analyze.

The majority Report is helpful in one sense. It inadvertently illustrates why Jefferson envisioned a federal system of checks and balances and division of power between the states and the federal government. The majority Report shows the mischief that could be achieved with federal-only regulation that seeks to displace the historical balance of federal and state regulation.

II.
THE OMA'S RESPONSES TO YOUR KEY QUESTIONS

The central question, in our opinion, is that of ensuring to the states their right to impose reasonable regulation designed to produce reasonable time, up-front, for evaluation and competitive bidding.

Your letter raises two issues that at first blush appear even more fundamental, but which on examination are so far-reaching that implementation is impossible or unwarranted.

First is the question of legislation subjecting all large amalgamations to a general public interest standard. The Rodino Subcommittee has held exploratory hearings on that issue. Attorney General Celebrezze of Ohio appeared at those hearings to testify on the hostile tender offer aspect of amalgamations. The Ohio Manufacturers' Association (OMA) sees several problems with a general public interest approach. Defining the public interest so as to provide fair administration and a workable standard for judicial review is close to impossible. Furthermore, the federal antitrust statutes already apply to all forms of amalgamation. Those statutes are already on the books and can and should be enforced. We would note that the federal statute proposed by the OMA to expressly authorize state regulation of control share acquisitions and tender offers would aid the enforcement of federal antitrust statutes. As you realize, those statutes may be enforced either by governmental action or by private parties. Governmental enforcement will necessarily vary from time to time as different Administrations have different concepts of the reach and value of those statutes, but private parties are not bound by the views of any Administration. Thus, if there is a longer up-front time period for control share acquisitions and tender offers, the opportunities for effective private enforcement multiply. The OMA's position, therefore, is that while general public interest legislation is unworkable and unwise, legislation of the type recommended by the OMA will aid the overall enforcement of the federal antitrust statutes and is thus the indicated solution on this issue.

Second, your letter raises the issue of credit controls that might restrict bank lending for large amalgamations. Again, the OMA believes such proposals to be overkill. Amalgamations, large and small, can produce beneficial results; how does a regulator distinguish between good and bad results? The federal antitrust statutes can and should be enforced to control monopolies and anti-competitive amalgamations; and as indicated earlier, in the control share acquisition and tender offer area, if the minimum time periods are the 50 or 60 days that state regulation has mandated, the federal antitrust statutes can be better enforced. Moreover, if there is a reasonable slowing down of the hostile tender offer, everyone will have more time for reflection on all matters, including the reasonable use of credit. Thus, the limited federal legislation we request will be the most workable solution to the problem.

The Detrimental Effects of, and Benefits
<u>of, Takeovers; Value of Competitive Bidding</u>

Your letter also asks several more general questions about the detrimental effects of takeovers and their benefits.

The majority Report of the Advisory Committee (page 9) concluded that

> "On the strength of the evidence presented, the Committee does not believe that there is sufficient basis for determining that takeovers are per se either beneficial or detrimental to the economy or the securities markets in general, or to issuers or their shareholders specifically."

This significant statement should not be overlooked. The OMA believes this finding is compelled by the evidence. Historically, state law -- and until the past 10 years, the SEC -- have operated on this assumption. State law has regulated takeovers in order to provide full, fair and effective disclosure and an adequate time frame for evaluation so that each individual offer could be judged on its merits, for any given offer could be good or bad for investors and the economy. This finding flies in the face of pure Chicago School positions that would rule out all regulation on the grounds that takeovers are per se beneficial. Reasonable regulation is indicated, and that is what the draft legislation supported by the OMA would provide. Stated more strongly, if takeovers are neither per se bad nor per se good, reasonable regulation to preserve the integrity of the process (and the perceived integrity of the process) is affirmatively required.

The great value of adequate time for developing competitive bids once a hostile tender offer erupts should be made explicit. Pure Chicago School theory -- as espoused, for example, in the Easterbrook and Jarrell dissent to the majority Report of the Advisory Committee -- would forbid all federal and state regulation. The premise is that tender offers are per se beneficial and thus should be encouraged by the absence of regulation. The Report's finding, discussed above -- that the evidence doesn't show that tender offers are per se bad or good -- kills the Easterbrook and Jarrell thesis, which would lead to many cheap, hit-and-run offers. Encouragement of competitive bidding -- the result of the OMA proposal -- leads to greater returns to shareholders once hostile offers are made. The OMA proposal will create fewer, but better offers. There is no public policy favoring the old pre-1968 Saturday night specials -- cheap offers with, say, a 5-day deadline, giving management no time to find better offers (and in the process perhaps negotiate a better price with the first offeror or force a better price from it). Common sense dictates that the shareholders of the target deserve the best price their management can get for them, and management can get the best price if there is a 50 to 60-day minimum time period for offers. What is needed in the hostile offer situation is reasonable time for study and action. Justice Goldberg's dissent from the majority Report of the Advisory Committee makes this point. So does Professor Lowenstein in his article cited supra. The SEC has traditionally been cool to competitive bidding as a desirable outgrowth of reasonable regulation of offers and the majority of the Advisory Committee only grudgingly accept the high utility of competitive bids. On the other hand, state regulation has warmly embraced the concept of adequate time for competitive bids to be sought and for the resulting leverage that gives management to drive up the bid of the first offeror. The shareholders' investment in the target should get maximum value when a hostile offer comes -- it should not receive minimum value simply because shareholders ordinarily lack the mechanisms for a collective vote that are present in negotiated mergers and sales of assets. The fact that this will discourage the cheap, hit-and-run offer is fine for almost everyone -- there will be fewer, but much better hostile offers.

III
SOME COMMENTS ON SPECIFIC RECOMMENDATIONS OF THE MAJORITY REPORT OF THE ADVISORY COMMITTEE

Acceleration of Securities Tender Offers

Aside from the recommendations for express Congressional preemption of state control share acquisition and tender offer legislation, the most crucial recommendation of the majority Report is Recommendation 12, which would allow a bidder in a securities tender offer to commence the offer upon the filing of the 1933 Act registration statement, rather than upon effectiveness of that statement, which is the present rule. This proposed change, which we understand the SEC contends it has the power to implement by a rule change without underlying legislation by Congress, would be extremely harmful, especially without the longer 50 and 60-day minimum periods of state law. The very existence of this recommendation for acceleration of the most complex type of tender offer makes it all the more important that Congress promptly enact the legislation favored by the OMA, which legislation would expressly empower the states to provide minimum periods of up to 60 days.

At the present, securities tender offers are slowed down because of the full disclosure called for by Securities Act Form S-1, the most comprehensive form, and the requirement that such statement be filed and effective <u>before</u> the securities tender offer begins. The majority Report wants to accelerate even the most complex form of tender offers. In addition, the majority Report contemplates that the disclosure document would be reduced from the complete S-1 that is now required to a skeleton document saying very little. Securities tender offers are inherently more complex because three securities must be evaluated: (1) the securities of the target; (2) the present securities of the offeror; and (3) the securities of the offeror once the target is taken over by the offeror. Reasonable time is needed for this process even where the offeror is a blue-chip offering blue-chip securities. In fact, the offerors that offer securities rather than cash will often be companies that are less than blue-chip, for a blue-chip company can often borrow the cash. Thus, a quite possible result of this recommendation, especially if the legislation recommended by the OMA is not enacted, would be a rash of complex, accelerated offers of securities that are not high-grade.

To be explicit, the OMA opposes this recommendation, especially if the states are not expressly authorized to set reasonable minimum time periods.

Regulation of Defensive Tactics

Recommendations 33 to 43 are a motley collection of recommendations aimed at thwarting defensive tactics, which at present are regulated by state law. Many of these recommendations would override action taken by a shareholder vote (e.g., high vote requirements). Others would require shareholder votes--sometimes of an advisory nature--where none is now required. The Advisory Committee is unsure of the proper rationale, but sure of its end result of undercutting state law to produce a tilted playing field favoring offerors. The majority Report is wrong in its approach, its many rationales, and the end it seeks.

Historically, management has been entitled to exercise its business judgment to start the auction process and encourage competitive bids. This has been the almost invariable result of defensive tactics (other than the successful assertion of a federal antitrust defense or a similar statute evidencing high public policy, which statutes management should be free to assert). Even Martin-Marietta's Pac-Man offer led eventually to Allied's offer. The most dramatic gestures--poison pills--have most often led to a later competitive bid that won. The point is that management of the target in a hostile bid must have the means to bargain hard. Otherwise, there often will be no competitive offers or better offers from the first offeror unless management demonstrates its belief in the value of the company. Management is paid to exercise its judgment, and it is most crucial that management not be timid when there is a hostile offer. The offeror wants to benefit itself by a low price. It is up to the management of the target to drive the price up, and the target's management cannot do that if its hands are tied.

Moreover, especially where the shareholders have approved a structure or action by their vote, it is quite difficult to argue that such action should be overturned in Washington, D. C.; do potential offerors know better than shareholders how the latter should act? Also, do offerors know more than the directors of the target (including the independent directors of the target) about the target actions that will benefit the target's shareholders? Offerors, after all, want to pay as low a price as possible.

For generations, the state courts have had experience with the application of the business judgment rule, which governs all of the actions of all directors. Remedies for directors who fail to toe the mark have been developed. To tell shareholders that their directors--on whom the shareholders must depend, especially in the face of a rapid-moving hostile offer--cannot rely upon state law that has been created during the past 150 years is the height of harmful elitist arrogance.

One could envision a different scheme--one such as that described by Justice Goldberg in his dissent from the majority Report. In a hostile offer, Justice Goldberg would have a substantial "cooling-off" period in which additional offers would first be solicited and then the offers would be voted upon by shareholders of both the offeror corporation and the target corporation. If such a scheme were implemented, a different set of rules might be appropriate. The majority Report, however, rejects the idea of shareholder votes by either the target or the offeror corporations and thus wants to leave the offeror free to move fast while tying the target's hands. The Goldberg solution, therefore, seems not likely to be implemented. With the offeror free to move at will as it wishes, the business judgment rule and state law should continue to be the guide for targets. The offered federal solutions demonstrate again why substantive corporations law is best left in the state domain.

The majority Report also overlooks the growing importance of institutional investors. As institutional investors gain more stock, shareholders as a group have greater control over directors, who are of course subject to proxy fights or to the penalties flowing from a reduced stock price when investors disapprove of management's performance relating to takeovers or any other situation.

The majority Report also fails to give sufficient weight to another recent development--the growth in number and importance of disinterested, independent directors (directors who are not officers and who are otherwise independent). In a takeover-related situation, the disinterested, independent directors have and exercise a powerful voice. Such directors almost universally require favorable opinions of investment bankers before defensive tactics are undertaken.

A final point about defensive tactics should be made. Pac-Man and other hardball tactics are often induced by the current short minimum time frames of hostile offers. If a longer period of 50 to 60 days is allowed under state law, offeror and offeree will have more time to negotiate with each other and the target will have more time to solicit competing bids, which is the best defensive tactic. The Allied-Martin-Marietta-Bendix fiasco took place under the short 20 business days rule of the SEC. Greater time for consultation and negotiation might well have resulted in calmer tactics.

On some defensive tactics, the SEC might require more disclosures. That would be true, for example, of golden parachutes, a contract giving an executive a right to a certain amount of compensation if there is a change of control. Those contracts do create an independent attitude among the insiders, in that they can view a takeover without thinking that much about their own situation, for they will have some compensation regardless of who is in control. On the other hand, golden parachutes are perceived by some persons as possibly being unfair. In such a situation, it is the time-honored station of the SEC to educate everyone by requiring sharper and clearer disclosure. They might, for example, require the board of directors to state in a public filing why it thinks its golden parachute contracts are fair. There is precedent for such disclosure in the SEC's going private rules. But the role of the SEC stops there and should continue to stop there. The reasonableness of any golden parachute contract can be challenged under state law in a shareholders' derivative action. The buck should remain with state law.

Partial Tender Offers; Two-Step Tender Offers

The majority Report rejects calls for prohibition of partial tender offers (offers for less than 100%) and two-tier tender offers, which commonly are offers of cash for a majority of the stock followed by a later statutory merger in which securities of the offeror are given. The OMA agrees with these recommendations, assuming enactment of the statute supported by it to specifically empower the states to regulate control share acquisitions and tender offers. Assuming enactment of such a statute, the states could deal with the delicate balance of pluses and minuses involved in these types of offers. Clearly, there are offerors who do not have the cash or securities to make a 100% offer. If there is a 50 or 60-day minimum period, management can shop around for a better 100% offer. If none is found, it may be better to proceed with a partial offer or a two-tier offer than to have no offer. Under the current Ohio legislation, §1701.831 of the Ohio Revised Code, the question of whether to approve a partial or two-tier offer would be put to a vote of the shareholders, including disinterested shareholders. In addition, management would be free to shop for a 100% offer--or such an offer could voluntarily come forth--to put before shareholders at the same time. If the federal legislation supported by the OMA is enacted and states are thus free to provide more time and a government hearing or a shareholders vote, the OMA supports the Advisory Committee's recommendations on partial and two-tier tender offers. [In Recommendation 16, the majority Report does call for a minimum period for a partial offer of two weeks longer than the 30 calendar days recommended for other offers. The OMA believes that is insufficient since 44 days do not equal 60 days and since the majority Report would preclude state legislation calling for government hearings or a shareholers vote.]

Requirement That An Offeror Go Above 20% Only By a Tender Offer

Recommendation 14 of the majority Report states that--

> "No person may acquire voting securities of an issuer, if immediately following such acquisition, such person would own more than 20% of the voting power of the outstanding voting securities of that issuer unless such purchase were made (i) from the issuer, or (ii) pursuant to a tender offer. The Commission should retain broad exemptive power with respect to this provision." [Emphasis added.]

It is easy to see what the majority Report hopes to accomplish by this recommendation, but the caveat about broad SEC exemptive authority indicates that the majority also sees the great potential for mischief that is present. In short, the OMA proposes that this highly substantive, debatable matter be left to developing state law.

At first blush, it would appear fair to create more tender offers by forcing those wishing to go above 20% to eschew open-market purchases and/or private purchases from major shareholders. Suppose, however, that shareholders of the target vote to approve such purchases outside a tender offer. Shareholders may have no objection to the open-market purchases or to, say, the purchase of a 30% block from the major shareholders; indeed, such purchases may, in some cases, benefit the corporation and its shareholders and it may be clear that no ratable tender offer would be made (for example, the major shareholder would not wish to sell just a portion of his block). Under the recommendation of the majority Report, an SEC exemption would be required. This, the OMA submits, is another matter to be left to state law. Under present Ohio law, for example, this matter would normally be put to a shareholders vote, including a vote of disinterested shareholders. If the federal regulation advocated by the OMA is enacted, it can be expected that other states will act on this issue. Thus, assuming enactment of the federal legislation advocated by it, the OMA recommends against adoption of this proposal. State responses can be more creative and balanced.

Strengthening of §13(d)

Recommendations 13 and 15 of the majority Report ask for legislation and/or SEC action strengthening the early warning reporting system of §13(d) of the Securities Exchange Act of 1934. The OMA supports these reporting and disclosure ideas. Reporting and disclosure are the essence of the SEC's role.

Respectfully submitted,

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