ACTION MEMORANDUM

March 13, 1984

TO	:	The Commission
FROM	:	Division of Corporation Finance
SUBJECT	:	Commission's views on the recommendations of the Advisory Committee on Tender Offers ("Advisory Committee")
RECOMMENDATION	:	That the Commission authorize the Chairman to advise the House Committee on Energy and Commerce and the Senate Committee on Banking, Housing and Urban Affairs of the Commission's positions on the recommendations of the Advisory Committee as set forth in this memorandum.
ACTION REQUESTED BY	:	Week of March 12, 1984
TENTATIVE SUNSHINE ACT STATUS	:	Open Meeting
VIEWS OF OTHER OFFICES OR DIVISIONS CONSULTED	:	Office of General Counsel Division of Market Regulation Directorate of Economic and Policy Analysis Office of Chief Economist
PRIOR COMMISSION ACTION	:	None
REGULATORY FLEXIBILITY ACT STATUS	:	Not applicable
PERSONS TO CONTACT	:	John J. Huber (272-2800) Linda C. Quinn (272-2579) David B.H. Martin, Jr. (272-2573)

I. Introduction

Hearings of the Subcommittee on Telecommunications, Consumer Protection and Finance for the House Committee on Energy and Commerce (the "Subcommittee") to consider takeovers generally and the recommendations of the Advisory Committee have been scheduled for March 28. The Subcommittee has requested the Chairman to testify with respect to the Commission's views on the recommendations, as well as any other issues regarding the regulation of takeovers that the Commission deems appropriate.1/

Since the Advisory Committee submitted its report last July, the staff has provided the Commission various analyses of the Advisory Committee's recommendations.2/ On the basis of studies of the various Divisions and Offices, and the views of the individual Commissioners, it is proposed that the Commission authorize the Chairman to advise the Subcommittee, and any other member or committee of Congress that may inquire, of the following views of the Commission on the regulation of takeovers generally and the recommendations of the Advisory Committee specifically.3/

1/ The Subcommittee has requested a written statement of the Commission's views by March 21. By letter dated October 26, 1983, Representative Timothy Wirth, Chairman of the Subcommittee, requested the Commission's views on the Advisory Committee's recommendations as well as any additional proposals the Commission thought appropriate.

2/ Information Memorandum of the Division of Corporation Finance, re: Recommendations of Advisory Committee on Tender Offers, dated September 2, 1983; Information Memorandum of the Office of General Counsel, re: Preliminary Comments on the Report of the Tender Offer Advisory Committee, dated October 13, 1983; memorandum of the Directorate of Economic and Policy Analysis, draft dated January 6, 1984; memorandum of the Office of the Chief Economist, attached to March 5, 1984 Information Memorandum of the Division of Corporation Finance; and Information Memorandum of the Division of Corporation Finance, re: Recommendations of the Advisory Committee on Tender Offers, dated March 5, 1984.

3/ Tab A to this memorandum contains a summary of proposed Commission positions on each of the Advisory Committee's recommendations.

II. Policies and Basic Objectives of Federal Regulation of Takeovers

The Commission concurs in the Advisory Committee's findings that (i) there is no conclusive evidence that tender offers are, in comparison to other forms of acquisitions, per se beneficial or detrimental; (ii) the merits or demerits of a particular transaction are less attributable to the method of acquisition, and more to the business judgment reflected in combining the specific enterprises involved; and (iii) when conducted in accordance with the laws necessary to protect shareholders and the markets, tender offers add to the liquidity and efficiency of the national markets, facilitate the transfer of corporate control, and therefore are a valid method of capital allocation.4/

The Commission also agrees with the Advisory Committee's conclusion that there is no material distortion in the credit markets resulting from takeovers and that no regulatory initiative should be undertaken to limit the availability of credit in such transactions, or to allocate credit among such transactions.5/ The Commission notes, in this regard, however, that it lacks both the expertise and the authority to evaluate this recommendation in its fullest.

On the basis of these findings, the Commission reiterates its endorsement of the principle of neutrality that underlies the Williams Act - i.e., to the extent consistent with the protection of shareholders and the markets, the regulatory scheme applicable to takeovers should not favor either bidders or target companies.6/ The fundamental purpose of the regulatory scheme should be to insure the integrity of the markets and to protect shareholders and market participants against fraud, non-disclosure of material information and the creation of situations in which a significant number of reasonably diligent small shareholders may be at a disadvantage to market professionals.7/ The regulatory scheme implemented

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4/ Recommendation 1.

5/ Recommendation 2.

6/ Recommendation 3.

7/ Recommendations 3 and 7.

to serve these purposes should not unnecessarily restrict innovation and should provide enough flexibility to permit techniques to evolve in relationship to changes in the market and the economy and to provide the Commission sufficient authority to curb abuses arising from such changes.8/

Regulation of takeovers should continue to be federal, since, as recognized by the Supreme Court in Edgar v. MITE Corp., 9/ these transactions take place in the national securities market, 10/ and their regulation by the states would place an undue burden on interstate commerce.11/ This proposition is not intended to undermine the preeminence of state law with respect to the internal affairs of a corporation. As a general rule, the internal affairs of a corporation ought to be regulated by state law.12/ Exceptions to this principle should be limited to those situations where the interests of shareholders are being abused and the purposes of the federal regulatory scheme are frustrated. In applying the business judgment rule in takeover situations, the

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8/ Recommendations 6 and 8. The Commission also agrees with the Advisory Committee's reminder that in regulating various control acquisitions the effect of such regulation on other techniques of acquiring control should not be overlooked. Recommendation 10.

9/ 457 U.S. 624 (1982)

10/ Recommendations 4 and 9(a).

11/ The Commission concurs in the Advisory Committee's recommendations regarding the inter-relationship of federal takeover regulation and state regulation of public interest businesses and federal regulation of particular industries (Recommendation 9(c) and (d)) and its recommendation that federal takeover regulation not be used to achieve anti-trust, labor, tax, use of credit and similar objectives (Recommendation 9(e)).

12/ Recommendation 9(b).

Commission believes that shareholders would be better served if the courts were more appreciative of the potential conflict of interests between the management and shareholders, and less willing to presume the regularity of management's conduct.13/

Finally, the Commission agrees with the Advisory Committee that, to the extent consistent with the protection of investors, the regulatory disincentives to exchange offers should be eliminated.14/ There is no reason that the regulatory scheme should favor cash consideration over securities. Further, the reduction of regulatory disadvantages to exchange offers may result in the increased use of equity and a concomitant reduction of credit needed in these transactions.

III. Specific Recommendations with Respect to the Regulation of Bidders

Based on the policies described in Section II of this memorandum, the Commission has the following views regarding the Advisory Committee's recommendations for the regulation of bidders.

13/ See, e.g., Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Treadway Companies, Inc. v. Care Corp., 638 F.2d 357 (2d Cir. 1980); Crouse-Hinds Co. v. InterNorth, Inc. 634 F.2d 690 (2d Cir. 1980), Johnson v. Trueblood, 629 F.2d 287 (3rd Cir. 1980), cert. denied, 450 U.S. 999 (1981). See also Gutman, Tender Offer Defensive Tactics and the Business Judgment Rule, 58 N.Y.U.L. Rev. 621 (1983); Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law be Mobilized to Overcome the Business Judgment Rule?, 1983 J.Corp. L. 337; Note, Misapplication of the Business Judgment Rule in Contests for Corporate Control, 76 Nw.U.L. Rev. 980 (1982).

14/ Recommendation 5.

A. Equalization of Cash Bids and Exchange Offers (Recommendations 11 and 12)

The Commission agrees with the Advisory Committee's proposal to put cash tender offers and exchange offers on an equal regulatory footing (Recommendation 5). To implement that general policy, the Commission believes Recommendations 11 and 12 are appropriate. The Division of Corporation Finance is in the final stages of a rulemaking project to propose a new registration form (Form S-4) for business combinations and exchange offers. Form S-4 will apply the concepts of integration of disclosure under the Securities Act and the Exchange Act previously used in the adoption of Forms S-1, S-2 and S-3.15/

The proposal in Recommendation 12 to permit exchange offers to commence upon the filing of the registration statement will require certain amendments to rules and policies under the Securities Act. The principal amendment will be to permit the tender of shares prior to effectiveness of the registration statement. The Commission believes that such an amendment would be in the public interest so long as the shares are withdrawable and so long as it is clear that the ability to accept tenders is a unique exception to the general rule that a registrant may not accept any consideration for the securities offered pursuant to a Securities Act registration statement prior to effectiveness. This narrow exception would be based on the interest in making exchange offers more competitive with cash offers. The Commission would emphasize, however, that these modifications will be strictly confined to the exchange offer context.

15/ Recognizing the distinction between the offering of securities for cash, where an investor's participation is voluntary, and an exchange offer, where the investment decision is not, Form S-4 will provide for a solicitation period during which investors may request the incorporated documents.

B. Open Market and Privately Negotiated Purchases (Recommendations 13, 14 and 15)

1. Beneficial ownership reporting (Recommendation 13).

The Commission agrees with the Advisory Committee that the 10-day window period in Section 13(d) should be closed. This would more effectively accomplish the Congressional intent of alerting the issuer, the market, and all investors to rapid accumulations of equity securities. The Commission is concerned, however, that a pre-acquisition filing requirement could have serious economic consequences and affect the transferability of pre-existing blocks of equity. It believes, therefore, that alternative means of closing the ten-day window, ones not involving pre-acquisition filings, should be explored. Specifically, the Commission would like to consider a proposal to amend Section 13(d) to require immediate public announcement after going over five percent, filing of Schedule 13D not later than the next business day after crossing the threshold, and/or a standstill requirement until the filing is made and the market has had time to absorb the news. Such a proposal would give the market prompt notice of the accumulation but would not involve the possibly detrimental market effects likely to attend a pre-acquisition filing.

2. Mandatory tender offer for acquisitions of shares in excess of 20 Percent (Recommendation 14).

The Commission has serious reservations about the specific recommendation because it would represent an intrusion into state corporate law, 16/ could increase significantly the cost and time of control acquisitions, could significantly impair the transferability of pre-existing control blocks, and would be difficult to administer. Further, the recommendation would constitute a major change in current tender

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16/ Recommendation 14 is based on the premise that control is a corporate asset and any premium paid for it should be shared by all shareholders. State law, on the other hand, generally holds that control and any payment for the benefit of control belongs to the shareholder(s) who own the shares providing such control.

offer regulation. Given these concerns and given the proposal to close the 10-day window period (Recommendation 13), the Commission does not believe it is appropriate to endorse this recommendation without a significantly better understanding of its potential consequences.

3. Definition of "group" (Recommendation 15).

The Commission has reviewed its concept and definition of "group" and does not believe that further action is required at this time. The Commission will continue to monitor this issue.

C. Two-Tier Bids (Recommendation 16)

Recommendation 16 would extend the minimum offering period for a partial offer for two weeks longer than for an "any and all" offer. In adopting this proposal the Advisory Committee expressed certain concerns with respect to two-tier tender offers and their potential coercive affects on security holders. The Commission shares those concerns. The Commission believes, however, that this area requires further study for two principal reasons. First, the Commission thinks it would be appropriate to consider further the recommendation's basic premise, i.e., that two-tier tender offers are so inherently coercive as to require regulatory inhibition. Second, to the extent that significant coercive effects are confirmed, the Commission believes it would be appropriate to consider other, perhaps stronger, means for addressing that problem.

D. Timing and Mechanics of Tender Offers

1. Timing provisions (Recommendations 27, 17 and 18).

The Commission does not propose to change to calendar days as recommended by the Advisory Committee (Recommendation 27) because of the complications that such a change would create where time periods expire on weekends and holidays.

The Advisory Committee made a number of recommendations with respect to the timing provisions applicable to tender offers. Some of these recommendations endorse current rules; others represent changes in the current system. The Advisory Committee also adopted a general recommendation that the takeover process not be permitted to become too complex (Recommendation 32). The Commission's findings regarding the various recommendations on timing are premised on its agreement with this general proposal. Where the Advisory

Committee's proposals are not followed, it is in large measure to reduce complexity in the system and to avoid situations where individual shareholders may be disadvantaged in relation to market professionals.

Recommendation 17 proposes several changes to the current tender offer timing provisions. The Commission appreciates the concepts from which these recommendations derive, but on balance believes that the timing requirements should be simplified. Moreover, the Advisory Committee's failure to assure withdrawal rights during any proration period creates a substantial disadvantage to individual shareholders who do not know to wait until the end of the proration period to tender or who have to rely on the mails. The Commission believes that shareholders will be best served by a process that provides for prorationing and withdrawal rights throughout the offer.

The Commission does support the Advisory Committee's proposal that withdrawal rights not be automatically extended upon the commencement of a competing offer, as currently is the case. The ability of a competing bidder to cause timing changes in another offer leads to strategic bids and has caused bids for relatively few shares solely to delay completion of a prior offer. The Commission's proposed extension of withdrawal rights throughout an offer will minimize the affect of this change on shareholders. The Commission thus would propose that the principal timing provisions for tender offers be as follows:

(i) Minimum offering period of 20 business days,

(ii) Withdrawal and proration rights throughout the offering period; and

(iii) No time periods affected by the commencement of a competing bid.

Recommendation 18 would extend the minimum offering period and the prorationing period for five calendar days from the announcement of an increase in price or number of shares sought. This would change the current system in two respects. First, it would reduce the extension time from 10 business days to five calendar days. Second, it would add as a trigger for extension an increase in the number of shares sought. As to the first change, the Commission would solicit public comment as to the particular length of the extension, noting

its disinclination to change to calendar days and its concern that the extension period be long enough to allow reasonable communication of the change in terms to all shareholders. As to the second proposed change, the Commission supports extension of the offering period based on an increase in the number of shares sought.

As stated above, the Commission supports a system with prorationing and withdrawal rights throughout an offer. Therefore, any time the offer is required to be extended because of an increase in the value of an offer, prorationing and withdrawal would likewise automatically be extended.

The Commission agrees with the Advisory Committee's endorsement in Recommendation 28 of the current rules defining commencement of a tender offer.

The Commission also agrees with the proposal in Recommendation 29 to define the period in which a mailing of tender offer materials must be completed. The proposal would provide greater clarity to the current regulatory scheme and will foreclose on opportunity for abuse that may now exist. The precise period would be determined after the opportunity for public comment.

2. Mechanics (Recommendations 21-26 and 30-32).

The Commission previously has noted that it intends to amend Rules 14a-7 and 14d-5 to provide insurgents and bidders access to information concerning non-objecting beneficial owners. These amendments would be consistent with Recommendation 21.

Recommendation 22 would eliminate a significant handicap that hostile bidders and dissident shareholders have in attempting to communicate directly with shareholders of an issuer. The Commission recognizes that the Advisory Committee's recommendation will preempt state laws governing access to the stockholder list in the case of proxy contests and tender offers. While the Commision is generally reluctant to intrude into state corporate law, it does not believe that shareholders' interests are well served by restrictions on the ability of dissident shareholders or bidders to obtain such information. Access to the stockholder list should not be a factor affecting a control contest. Shareholders should have the right to receive communciations in a timely fashion, whether they are sent by management or another shareholder or bidder. Therefore, the Commission supports Recommendation 22.

The Commission supports the proposal in Recommendation 23 that tender offer reply forms be standardized to the extent possible and will offer whatever assistance is appropriate to private sector initiatives.

Recommendations 24-26 and 30-31 endorse current law.17/ The Commission agrees with these recommendations.

E. Disclosure (Recommendations 19-20)

The Commission considered the area of disclosure concerning projections or asset valuations when it issued its policy statement on projections and adopted Rule 175 under the Securities Act and Rule 3b-6 under the Exchange Act. At that time it determined not to require disclosure of underlying assumptions. Based on this recent determination, the Commission is not inclined to support Recommendation 19.

The Commission agrees with Recommendation 20 regarding disclosure generally and the specific amendment of Rule 14d-6(a)(2) to permit disclosure of conditions to the offer in summary ads.

IV. Specific Recommendations with Respect to the Regulation of Target Companies

A. Support of State Corporate Law and the Business Judgment Rule (Recommendation 33)

As discussed in Section II of this memorandum, the Commission supports the preeminence of state corporate law and believes federal intrusion should be undertaken only in limited situations where shareholders' interests are abused and the purposes of the federal regulatory scheme are being frustrated. As noted above, the Commission believes the

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17/ Recommendation 24 - rejection of a federal requirement of "fairness" of tender price.

Recommendation 25 - endorsement of best price rule.

Recommendation 26 - endorsement of Rule 10b-13.

Recommendation 30 - voluntary extensions.

Recommendation 31 - state law governance of need for an approval of the bid by the shareholders of the bidder.

courts should be more sensitive to the potential conflict of interests between management and shareholders in the proxy contest and tender offer context.

B. Invalidity of State Takeover Laws (Recommendation 34)

The Commission continues to believe that the regulation of takeovers should be federal; state regulation of third party acquisitions of shares constitutes an undue burden on interstate commerce and frustrates the purposes of the Williams Act. Therefore, the Commission endorses the Advisory Committee's Recommendation 34.

C. Federal Prohibition of Adoption of Corporate Charter or By-Law Provisions that Erect High Barriers to Changes of Control (Recommendation 35)

While it is concerned about the anti-takeover effects of such provisions, the Commission does not believe that such a serious intrusion into the internal affairs of a corporation is warranted at this time. The Commission wants to make clear, however, that its reluctance to endorse the Advisory Committee's proposed federal prohibition of anti-takeover charter and by-law provisions does not reflect any less concern than the Committee's with respect to such devices. Indeed, the Commission would support any state initiative to limit these devices, or action by the exchanges and NASD to discourage adoption of such provisions. The Commission's position is based solely on its concerns for preempting state corporate law so broadly and fundamentally. Such concerns do not, however, preclude Commission support for federal regulation of certain tactics that harm shareholders and frustrate the purposes of the Williams Act, even if such tactics involve corporate charter or by-law provisions.18/

D. Super Majority Vote Provisions (Recommendation 36)

As noted above, the Commission is not prepared at this time to recommend federal regulation of the adoption of charter amendments to effect anti-takeover provisions. The Commission does support the concept that super majority votes should be subjected to the same degree of shareholder vote for adoption, although it does not necessarily agree that such provisions should be subject to re-ratification after adoption.

18/ See discussion of "poison pill" and blank check preferred stocks.

E. Disclosure of Change of Control Policies and Advisory Votes (Recommendation 37)

The Commission believes an annual disclosure of anti-takeover policies in an issuer's proxy statement is a good suggestion and is consistent with Commission initiatives in this area.19/ Duplication could be minimized by requiring disclosure of those policies not disclosed to shareholders in a proxy statement since the last annual meeting proxy statement. In effect, this would result in disclosure of those policies adopted during the year without shareholder approval.

The Commission is not prepared at this time to endorse a requirement of annual advisory votes on an issuer's change of control related policies. The effectiveness of such votes is problematic, particularly where unilateral board action cannot effect the shareholders' will (e.g., rescission of super majority charter provisions). Moreover, such a requirement could interfere fundamentally with traditional principles of corporate governance and fiduciary obligations of management applicable under state law.

F. Golden Parachutes (Recommendation 38)

The Commission concurs in the Advisory Committee's assessment of "golden parachutes." Specifically, it does not appear that these arrangements have any effect on a takeover. There may be a need for some regulatory response, however, given the public concern with such arrangements, particularly when adopted in the face of a takeover, the appearance of management self dealing at a moment of corporate vulnerability, and the perceived failure of management to place the interests of shareholders foremost of management. The Commission does not propose to take a position as to whether this is best done through tax legislation or other federal regulation. The Commission would suggest that any Congressional initiative only address arrangements adopted

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19/ See Release No. 34-15230 (October 13, 1978), which sets forth the views of the Division of Corporation Finance concerning disclosure in proxy and information statements proposing anti-takeover amendments; Item 202(a)(5) of Regulation S-K that requires a description of certain anti-takeover provisions in the description of a registrant's capital stock. In adopting Item 402(e) of Regulation S-K, the Commission noted the Advisory Committee's recommendation on disclosure of change of control related compensation. See Release No. 33-6486 (September 23, 1983).

in the face of a threatened takeover. This would avoid many of the problems of distinguishing between golden parachutes and normal employment contracts.

G. Target Company Defensive Tactics (Recommendations 39-42)

The Commission is concerned about a number of target company defensive tactics that may not be in shareholders' best interests. Specifically, the Commission believes the sale of significant assets during a tender offer or proxy contest must be subjected to closer judicial scrutiny under the business judgment rule. Defensive issuer self tenders should be prohibited, 20/ and management should be required to demonstrate that a counter tender offer is not undertaken in its own interest and is a reasonable business transaction. 21/ Issuances of any securities that would exceed 5% of the class outstanding after issuance should be subject to shareholders' approval. 22/

"Poison pills" and preferred stock dividends debuted as anti-takeover devices subsequent to the Advisory Committee's report. The Commission is greatly concerned about their use, particularly in those cases where the poison pill would substantially diminish the value of the corporation if triggered and where a preferred stock dividend is used

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20/ In the interim prior to implementation of the general prohibition, the Commission proposes to implement the Advisory Committee's Recommendation 39(b) to eliminate the current timing advantages under the issuer tender offer rules.

21/ The Commission does not agree with the Committee that a general prohibition of counter-tenders in the face of a 100% cash offer is necessary or appropriate.

22/ Recommendation 41. The Commission believes that a target company should not issue securities during a tender offer or proxy contest except in the ordinary course of its business. To this end, it believes a lower threshold than that proposed by the Committee, applicable to all classes of securities, should be considered. Security includes any security convertible into such security, any option, warrant, or other right to acquire such security.

to implement anti-takeover provisions that otherwise would be subject to shareholders' approval. To the extent that the business judgment rule is applied to permit such tactics, the Commission believes a federal response may be warranted.

H. "Green Mail"

The Commission wholeheartedly shares the concerns of the Advisory Committee that the vulnerability of issuers to green mail and the substantial payoffs made by management to these "green mailers" erodes the public's confidence in the integrity of the takeover process as well as in corporate management. The Commission supports the Committee's recommendation.

V. Specific Recommendations With Respect to the Regulation of Market Participants

A. Rule 10b-4 (Recommendations 44-46 and 47)

In general, the Commission agrees with the Advisory Committee's recommendations concerning Rule 10b-4. However, the Commission has reservations with respect to the Advisory Committee's proposed interpretation of "net long position" under Rule 10b-4 as applied to call option holders because of its subjective nature.

B. Processing of Tender Offers (Recommendation 48)

The Commission implemented Recommendation 48 with its adoption of Rule 17Ad-14.

VI. Interrelationship with Various Regulatory Schemes (Recommendations 49-50)

The Commission agrees with Recommendations 49 and 50, which propose procedural coordination of federal securities law and the pre-merger notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act.

COMMITTEE RECOMMENDATIONS AND PROPOSED COMMISSION POSITION

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
I. Economics of Takeovers and their Regulation	
1. The purpose of the regulatory scheme should be neither to promote nor to deter takeovers; such transactions and related activities 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 Commission agrees with the general proposition.
2. 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.	The Commission has limited facts or expertise with which to evaluate this recommendation. With that qualification, the Commission agrees with the general proposition.
II. Objectives of Federal Regulation of Takeovers	
3. Takeover regulation should not favor either the acquiror or the target company, but should aim to achieve a reasonable balance while at the same time protecting the interests of shareholders and the integrity and efficiency of the markets.	The Commission agrees with the general proposition.
4. Regulation of takeovers should recognize that such transactions take place in a national securities market.	The Commission agrees with the general proposition. That agreement, however, should not be construed to justify a wholesale preemption of state corporate law.
5. Cash and securities tender offers should be placed on an equal regulatory footing so that bidders, the market and shareholders, and not regulation, decide between the two.	This general recommendation is related to Recommendations 11 and 12. The Commission supports the general proposition of minimizing the regulatory discentives to exchange offers to the extent consistent with investor protection.

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
6. Regulation of takeovers should not unduly restrict innovations in takeover techniques. These techniques should be able to evolve in relationship to changes in the market and the economy.	The Commission agrees with the general proposition.
7. Even though regulation may restrict innovations in takeover techniques, it is desirable to have sufficient regulation to insure the integrity of the markets and to protect shareholders and market participants against fraud, non-disclosure of material information and the creation of situations in which a significant number of reasonably diligent small shareholders may be at a disadvantage to market professionals.	The Commission agrees with the general proposition.
8. The evolution of the market and innovation in takeover techniques may from time to time produce abuses. The regulatory framework should be flexible enough to allow the Commission to deal with such abuses as soon as they appear.	The Commission agrees with the general proposition.
9. a. State Takeover Law. State regulation of takeovers should be confined to local companies.	The Commission agrees with the general proposition.
b. State Corporation Law. Except to the extent necessary to eliminate abuses or interference with the intended functioning of federal takeover regulation, federal takeover regulation should not preempt or override state corporation law. Essentially the business judgment rule should continue to govern most such activity.	The Commission agrees with the Advisory Committee's recognition of the general preeminence of state corporate law with respect to the internal affairs of a corporation. However, in the application of the business judgment rule in a change of control context, the Commission believes that shareholders would be better served if the courts gave greater recognition to potential conflicts of interest between management and shareholders.

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
c. State Regulation of Public Interest Businesses. Federal takeover regulation should not preempt substantive state regulation of banks, utilities, insurance companies and similar businesses, where the change of control provisions of such state regulation are justified in relation to the overall objectives of the industry being regulated, do not conflict with procedural provisions of federal takeover regulation and relate to a significant portion of the issuer's business.	The Commission agrees with the general proposition.
d. Federal Regulation. Federal takeover regulation should not override the regulation of particular industries such as banks, broadcast licensees, railroads, ship operators, nuclear licensees, etc.	The Commission agrees with the general proposition.
e. Relationships with Other Federal Laws. Federal takeover 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.	The Commission agrees with the general proposition.
III. Regulation of Acquirors of Corporate Control	
10. 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.	The Commission agrees with the general proposition that those implementing takeover regulation should be aware of the implication of such regulations for other types of control acquisition techniques.
11. 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.	The Commission agrees with this recommendation.

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
12. Bidders should be permitted to commence their bids upon filing of 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 were 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.	The Commission agrees with this recommendation generally, reserving judgment on specific means of effecting the proposal.
13. No person may acquire directly or indirectly beneficial ownership of more than 5% of an outstanding class of equity securities unless such person has filed a Schedule 13D and that schedule has been on file with the Commission for at least 48 hours. Such person may rely on the latest Exchange Act report filed by the target company that reports the number of shares outstanding. The acquiror would have to report subsequent purchases promptly as provided by current law.	The Commission endorses closing the 10-day window period in Section 13(d). The Commission opposes a pre-acquisition filing requirement and proposes instead a requirement of immediate public announcement, next day filing of the Schedule 13D and/or a standstill until filing.
14. 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.	The Commission has serious reservations about this recommendation. The Commission does not believe it would be appropriate to endorse this recommendation without further study as to economic implications for the entire change of control area.
15. The Committee encourages the Commission to study means to strengthen the concept and definition of "group" or concerted activity.	Having reviewed its rules and interpretations, the Commission does not believe additional action is necessary in this area. The Commission will continue to monitor this area.

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
16. The minimum offering period for a tender offer for less than all the outstanding shares of a class of voting securities should be approximately two weeks longer than that prescribed for other tender offers.	The Commission is sensitive to the Committee's concerns regarding two-tier offers but is not certain that the Committee's recommendation is the best way of addressing these concerns. The Commission believes the issue requires further study.
17. The minimum offering period for an initial bid should be 30 calendar days; for subsequent bids the minimum offering period should be 20 calendar days, provided that the subsequent bid shall not terminate before the 30th calendar day of the initial bid. In each case, the minimum offering period will be subject to increase, if the bid is a partial offer. The period during which tendering shareholders will have proration and withdrawal rights should be the same length as the minimum offering period.	The Commission believes that the tender offer process should not be permitted to become so complex that it is understood only by investment professionals. See Recommendation 32. The Commission believes that the Committee's recommendations with respect to the timing of tender offers are too complex and may disadvantage non-professional shareholders. The Commission believes that shareholders would be better served by a system that simply provides for prorationing and withdrawal throughout the offering period, and a required minimum 20-business day offering period. The Commission endorses the Committee's proposal to eliminate the automatic extension of withdrawal rights upon commencement of a competing bid.
18. The minimum offering period and prorationing period should not terminate for five calendar days from the announcement of an increase in price or number of shares sought.	The Commission agrees that the offering period should be extended if there is an increase in the number of shares sought, as well as an increase in the consideration to be paid. Since prorationing and withdrawal rights are proposed to be required throughout an offer, any extension of the ofer will automatically

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
	extend prorationing and withdrawal. The Commission reserves judgment on the length of the extension pending results of public comment.
19. Where the bidder discloses projections or asset valuations to target company shareholders, it must include disclosure of the principal supporting assumptions provided to the bidder by the target.	The Commission does not endorse this recommendation at this time.
20. The Commission should review its disclosure rules and the current disclosure practices of tender offer participants 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 a summary advertisement used to commence an offer.	The Commission agrees with this recommendation.
21. The Commission should continue its efforts to facilitate direct communications with shareholders whose shares are held in street name.	The Commission agrees with this recommendation.
22. The Commission should require under its proxy and tender offer rules that a target company make available to an acquiror, at the acquiror's expense, shareholder lists and clearinghouse security position listings within five calendar days of a bona fide request by an acquiror who has announced a proxy contest or tender offer. The Commission should consider prescribing standard forms (written or electronic) for the delivery of such information.	The Commission agrees with this recommendation.
23. Tender offer reply forms should be standardized to the extent possible to facilitate handling by brokerage firms, banks and depositaries.	The Commission agrees with this recommendation.

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
24. 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.	The Commission agrees with this endorsement of current law.
25. All shareholders whose shares are purchased in a tender offer should be entitled to the highest per share price paid in the offer.	The Commission agrees with this endorsement of current federal securities regulation.
26. Current prohibitions of the purchase by a bidder of target company shares other than under the offer should be continued.	The Commission agrees with this endorsement of current federal securities regulation.
27. All time periods should be defined in terms of calendar days.	The Commission believes that all time periods should be defined in terms of business days.
28. "Commencement" of a tender offer should continue to be determined by present rules, and time periods should continue to run from that date.	The Commission agrees with this endorsement of current federal securities regulation.
29. Offering documents that are required to be mailed should be mailed within seven calendar days of commencement by announcement.	The Commission agrees with this recommendation.
30. 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.	The Commission agrees with this endorsement of current federal securities regulation.
31. Approval by shareholders of a bidder with respect to an acquisition should continue to be an internal matter between shareholders and management, subject only to applicable state law.	The Commission agrees with this endorsement of current law.

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
32. The takeover process should not be permitted to become so complex that it is understood only by investment professionals.	The Commission agrees with the general proposition.
IV. Regulation of Opposition to Acquisitions of Control	
33. 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 be the principal governor of decisions made by corporate management including decisions that may alter the likelihood of a takeover.	Qualified by its concerns regarding the application of the business judgment rule in the change of control area, the Commission agrees with the general proposition.
34. State laws and regulations, regardless of their form, that restrict the ability of a company to make a tender offer should not be permitted because they constitute an undue burden on interstate commerce. Included in this category should be statutes that prohibit completion of a tender offer without target company shareholder approval and broad policy legislation written so as to impair the ability to transfer corporate control in a manner and time frame consistent with the federal tender offer process. An exception to this basic prohibition may be appropriate where a significant portion of the target company is in a regulated industry and where special change of control provisions are vital to the achievement of ends for which the industry is regulated. Where such change of control provisions cannot be justified in relation to the overall objectives of the industry regulations or where only a small portion of the target company is in the regulated industry, there should not be an automatic impediment to the completion of a tender offer. Rather, the tender offer should be completed with the regulated business placed in trust during any post-acquisition approval period. Further, no such regulation should interfere with the procedural provisions under the Williams Act.	The Commission agrees with the general proposition.

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
35. Congress and the Commission should adopt appropriate legislation and/or regulations to prohibit the use of charter and by-law provisions that erect high barriers to change of control and thus operate against the interests of shareholders and the national marketplace.	The Commission shares the serious concerns of the Advisory Committee with respect to effects of these devices but is not prepared at this time to concur in such a broad intrusion into state corporate law.
36. To the extent not prohibited or otherwise restricted, companies should be permitted to adopt provisions requiring supermajority approval for change of control transactions only where the ability to achieve such a level of support is demonstrable. a. Any company seeking approval of a charter or by-law provision that requires, or could under certain circumstances require, the affirmative vote of more than the minimum specified by state law should be required to obtain that same level of approval in passing the provision initially. Ratification should be required every three years. b. Where a charter or by-law provision 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 or by-law provision. Ratification should be required every three years. c. For a nationally traded company that 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 supermajority provision within three years after such date, and continue to ratify such provision every three years thereafter.	The Commission agrees with the Advisory Committee that implementation of super majority voting requirements should require comparable votes for adoption. As noted with respect to Recommendation 35, however, the Commission is not prepared at this time to concur in such a broad intrusion into state corporate law. The Commission does not necessarily agree that such provisions should be subject to re-ratification after adoption.

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
37. The Commission 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 a. Matters Covered. Advisory vote matters should include: i. Supermajority provisions. To the extent not prohibited or otherwise restricted, 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); 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 shareholders" approval requirements); iii. Standstill agreements. Current agreements with remaining lives longer than one year that restrict or prohibit purchases or sales of the company's stock by a party to the agreement; and iv. Change of control compensation. 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.	The Commission supports and would propose for comment the concept of annual disclosure of certain change of control related policies. The Commission believes that the concept of advisory voting is problematic, however, and would not at this time support that element of the recommendation.

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
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. The outcome of an advisory vote would have no legal effect on an existing agreement.	
38. a. Change of Control Compensation During a Tender Offer. The board of directors shall not adopt contracts or other arrangements with change of control compensation once a tender offer for the company has commenced.	The Commission shares the Committee's concerns with the adoption of change of control compensation in the face of a takeover and concurs in the Committee's judgment that such activities may so undermine the public's confidence in the integrity of the takeover process as to require a federal response. The Commission would suggest distinguishing between arrangements entered into after a takeover is threatened and those adopted in the ordinary course. This avoids the substantial problems of separating "golden parachutes" from ordinary employment contracts. As noted with Recommendation 37, the Commission does not favor advisory votes. The Commission does agree that, as is currently required, issuers should disclose change of control related compensation, regardless of the timing of its adoption.
b. Change of Control Compensation Prior to a Tender Offer.	
i. Disclosure. The issuer should disclose the terms and parties to contracts or other arrangements that provide for change of control compensation in the Change of Control section of the annual proxy statement.	
ii. Advisory Vote. At each annual meeting, shareholders should 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 would have no legal effect on any existing employment agreement.	

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
39. a. In general, target company self-tenders should not be prohibited during the course of a tender offer by another bidder for the target company.	The Commission believes there should be a general federal prohibition on defensive issuer tender offers.
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 that of any tender offer commenced prior to the self-tender.	In the interim prior to implementation of such prohibition, the Commission agrees with this recommendation.
40. There should be no general prohibition of the counter tender offer as a defense. The employment of the counter tender offer should be prohibited, however, where a bidder has made a cash tender offer for 100% of a target company.	The Commission has serious concerns about the use of counter tender offers as a defensive tactic. Management should bear the burden of proving that a counter tender offer is not in management's own interest and reflects a reasonable business judgment.
41. Contracts for the sale of stock or assets to preferred acquirors should continue to be tested against the business judgment rule. During a tender offer, however, the issuance of stock representing more than 15% of the fully diluted shares that would be outstanding after issuance should be subject to shareholder approval.	The Commission supports the concept of requiring shareholder approval for the issuance of any securities representing more than 5% (not 15% as proposed by the Committee) of the class to be outstanding after issuance during a tender offer or proxy contest. Included within this concept would be options, warrants, and convertible securities. The Commission supports the general proposition that state corporate law, subject to revised application of the business judgment rule in takeovers, should govern disposition of assets during a tender offer.

RECOMMENDATIONS	PROPOSED COMMISSION POSITION
42. The sale of significant assets, even when undertaken during the course of a tender offer, should continue to be tested against the business judgment rule.	Subject to revised application of the business judgment rule, the Commission supports the general proposition that state corporate law should govern the disposition of significant assets in the context of a tender offer or proxy contest.
43. Repurchase of a company's shares at a premium to market from a particular holder or group that has held such shares for less than two years should require shareholder approval. This rule would not apply to offers made to all holders of a class of securities.	The Commission agrees with this recommendation.
V. Regulation of Market Participants	
44. The Commission should continue the current prohibition on short tendering set forth in Rule 10b-4. To ensure the effectiveness of that provision, the Commission also specifically should prohibit hedged tendering.	The Commission agrees with this recommendation.
45. In furtherance of the policy goals of Rule 10b-4, the Commission generally should require in a partial offer that all shares tendered pursuant to a guarantee be physically delivered, rather than permitting delivery only of the certificates for those shares to be actually purchased by the bidder.	The Commission agrees with this recommendation.
46. Rule 10b-4 should be amended to include a specific prohibition of multiple tendering.	The Commission agrees with this recommendation.
47. The Commission should revise its interpretation of Rule 10b-4 so that for the purposes of determining whether a person has a "net long position" in a security subject to the tender offer, call options on such security which a person has sold and which a person should know are highly	The Commission believes that the proposed interpretation would be too subjective, thus making it difficult to administer and enforce. The Commission is not prepared to endorse it.