TAKEOVER TACTICS AND PUBLIC POLIC.

J. 1

HEARINGS

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS, CONSUMER PROTECTION, AND FINANCE

OF THE

COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

H.R. 2371, H.R. 5250, H.R. 5693, H.R. 5694, H.R. 5695, and H.R. 5696

BILLS TO AMEND THE SECURITIES AND EXCHANGE ACT OF 1934 AND FOR OTHER PURPOSES

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Mr. WIRTH. Thank you very much, Mr. Norris.

Perhaps we could just move right down from your right to your left. Mr. Lipton, again, thank you very much for coming down. You in the past have been extremely helpful to the Congress on merger issues, and we appreciate your advise and expertise.

STATEMENT OF MARTIN LIPTON

Mr. LIPTON. Thank you, Chairman Wirth.

As has been mentioned, Mr. Wasserstein and I were both members of the SEC advisory committee, and I see here Linda Quinn and David Martin, who headed the SEC staff effort.

I, as you will see, am not in agreement with much of what the advisory committee recommended, and I have serious reservations with respect to the SEC position with respect to some of the recommendations that were made.

I do think that a very careful, comprehensive, and balanced study was produced primarily with the help of Ms. Quinn and Mr. Martin and their colleagues on the staff. I think the principal problem is that despite the neutrality premise of the Williams Act, the present takeover process is heavily weighted in favor of corporate raiders. Raiders are using creeping tender offers, rapid accumulations during the 10-day schedule 13D window period, greenmail, and two-tier front end loaded bootstrap tender offers.

To counter these abusive tactics, corporations that wish to remain independent and attempt to maximize the long-term values for their shareholders have been forced to resort to various defenses sometimes described in the pejorative terms that were mentioned at the introduction of the hearing. Self-tenders, Pac-man defenses, shark-repellant charter amendments, poison pills, and so on.

I am convinced that if we eliminate the two principal abusive tactics, greenmail and front end loaded tender offers, we will have solved 90 percent of the problems that were addressed by the SEC advisory committee and that are of concern to the committee. I have submitted—I will not attempt to get into the details of it, but I have submitted a draft amendment to the Williams Act that I think would accomplish that result.

First, greenmail. Greenmail is a form of legal corporate blackmail by raiders who accumulate 10 to 25 percent of a company's stock and then threaten a takeover or proxy fight if they are not bought out at a premium. As matters now stand, there is no practical way for a corporation that is seeking to remain independent to deal with this situation other than to purchase the accumulated shares, usually at a considerable premium over the current market price.

If the corporation does not purchase the shares, the corporation loses control over its own destiny, and runs the risk of being forced into a takeover situation at a time not of its own choosing, but one that has been chosen by the greenmailer. Frequently the takeover situation that results after a greenmail accumulation is not an offer to all of the shareholders for the same consideration, but a takeover that is structured to provide a special premium to the person who has accumulated the 10 to 25 percent block.

The accumulation of the more than 10 percent position is a device by which a raider preempts for itself all or part of the premium usually received by all of the shareholders in a negotiated merger. It is also a device by which a raider preempts the ability of the target's board of directors to determine the desirability, price, form, and timing of a merger of the company, a matter which every state corporation law commits to the hands of the company's board of directors.

Much has been said of the benefit to the shareholders of this kind of activity, how shareholders profit from the activity, yet studies show that in more than 50 percent of the cases where corporations have defeated a takeover attempt, the shares subsequently sell in the market at higher prices than the takeover price.

Indeed, I agree with what Mr. Norris said. There is too great a focus on the immediate price of the target company's stock, and not the long-term impact on the shareholders of the target company as well as on the economy as a whole.

Indeed, one can argue that in addition to the right to protect the long-term interest of the target shareholders by avoiding a takeover situation and remaining independent, the board of directors of a company that believes in the future prosperity of the company has a duty to do so even though it involves paying a premium to the greenmailer. The culprit is not the corporation that pays the greenmailer. The culprit is a regulatory system that permits accumulations in excess of 10 percent.

The other major takeover abuse is the two-tier front end loaded bootstrap takeover such as the Mesa Petroleum tender offers for Cities Service, General American Oil, and Gulf Oil. They are devices through which unsophisticated shareholders are taken advantage of by professional investors. The professionals all get the benefit of the front end load. The unsophisticated shareholders frequently end up with the low end. These bootstrap front end loaded tender offers present a very serious threat to our corporate system. They spawn corporate raiders where otherwise none would exist. They are devices by which a target's own balance sheet is used to finance a raid.

Of necessity, if successful, they create highly leveraged companies with enormous debt, debt that must be serviced by liquidations and reductions in capital expenditures, all of which come at the expense of employees, customers, suppliers, communities in which the companies operate, and in the long run the Nation's economy as a whole.

Today, even the largest and most successful company is not immune from a front-end loaded bootstrap raid. This means that management attention must be shifted from long-term planning to raid defense. Would we rather corporate management focus on new plants, new products, and increased employment, or would we rather divert their attention to the latest shark-repellant charter amendments and other means of defending against corporate raids?

For more than 50 years, Congress has been imposing public responsibility on business corporations. We had antitrust, labor, environmental, consumer safety, occupational safety, pension, and a

host of other laws that recognized that corporations have responsibilities to constituencies other than their shareholders.

Most economists today recognize that long-term planning by business corporations is essential to the future health of our economy, yet in the one area of corporate takeovers, we suffer the strange anomaly of the Government through the SEC arguing that all that counts is immediate profits to shareholders, that corporations should be subject to bootstrap raids through front-end loaded tender offers, and that corporate directors who seek to do long-term planning and serve the long-term interests of all corporate constituencies should not be protected by the business judgment rule.

The courts have consistently and repeatedly refused to accept this argument. I hope and trust that Congress will do likewise.

Now, I do have a solution to these two major abuses. It is something that I first urged in the 1974 SEC rulemaking proceedings. It is based in large measure on the rules of the City Takeover Panel in the United Kingdom. It is a straightforward limitation on accumulations to no more than 10 percent, an absolute limitation on the accumulation of more than 10 percent of a company's stock. If someone then wants to acquire more than 10 percent, that person must do so by a one price offer to all of the shareholders for all of the shares, no partial bids, no front-end loaded bids, a bid for all of the shares to all of the shareholders.

This solution does not interfere or conflict with State corporation law. It does not restrict the free market in securities or corporate control. It preserves the ability of those who have or who can raise on their own balance sheets the capital to make a fair tender offer, to acquire another corporation by tender offer. It eliminates completely the front-end loaded bootstrap tender offer, makes fair price and similar shark repellant charter amendments unnecessary, and will obviate the need for new State statutes, some of which may be of questionable constitutionality, of the type recently enacted in Ohio, Maryland, and Pennsylvania.

For all practical purposes, it eliminates the need for Pac-man defenses and self-tender offers in response to front-end loaded raids. It does not in any way interfere with the right of a target's board of directors to protect or defend against the tender offer. It also effectively eliminates the greenmail problem. If a raider or a group of raiders cannot accumulate more than 10 percent of a target's shares, there is no real threat of a change of control transaction without all shareholders being treated equally, and therefore no reason for the target to buy back the shares. The target will not buy. The greenmailer has no incentive to accumulate.

I think this solution would eliminate more than 90 percent of today's takeover problems without in any way disrupting the free market or interfering with State corporation laws, and I have, as I mentioned, submitted a draft proposal.

[Testimony resumes on p. 173.]

[The prepared statement of Mr. Lipton follows:]

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U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON TELECOMMUNICATIONS,
CONSUMER PROTECTION, AND FINANCE
OF THE
COMMITTEE ON ENERGY AND COMMERCE

TESTIMONY OF MARTIN LIPTON

MARCH 28, 1984

THANK YOU FOR INVITING ME TO APPEAR BEFORE THE SUBCOMMITTEE. I WAS A MEMBER OF THE SEC ADVISORY COMMITTEE ON TENDER OFFERS. I WAS NOT IN AGREEMENT WITH MANY OF THE COMMITTEE'S RECOMMENDATIONS AND, I HAVE SERIOUS RESERVATIONS ABOUT THE POSITION TAKEN BY THE SEC WITH RESPECT TO SEVERAL OF THE COMMITTEE'S RECOMMENDATIONS. AS A PRACTISING LAWYER, I HAVE SPECIALIZED IN TAKEOVER MATTERS AND HAVE WRITTEN A TREATISE AND A NUMBER OF LAW REVIEW ARTICLES ON THE SUBJECT. THE VIEWS I EXPRESS ARE MY OWN AND NOT THOSE OF MY FIRM OR ITS CLIENTS.

I BELIEVE IN THE FREE MARKET. I BELIEVE THAT THERE SHOULD BE A FREE MARKET IN CORPORATE CONTROL. I DO NOT THINK THAT ALL MERGERS SHOULD BE BANNED. I DO NOT THINK THAT BIGNESS IS BAD. I DO NOT THINK THAT OUR ECONOMIC AND POLITICAL SYSTEMS ARE THREATENED BY CONCENTRATION OF CORPORATE POWER THROUGH TAKEOVERS. I DO THINK THAT VERY SERIOUS CORPORATE TAKEOVER ABUSES HAVE DEVELOPED IN RECENT YEARS.

"GREENMAIL" -- WHICH IS LEGAL CORPORATE BLACKMAIL BY RAIDERS WHO ACCUMULATE 10-25% OF A COMPANY'S STOCK AND THEN THREATEN A TAKEOVER OR PROXY FIGHT IF NOT BOUGHT OUT AT A PREMIUM -- IS A DISGRACE AND SHOULD BE ELIMINATED. AS MATTERS NOW STAND THE ONLY PRACTICAL SOLUTION FOR A CORPORATION THAT IS SEEKING TO MAXIMIZE LONGTERM VALUES FOR ITS SHAREHOLDERS IS TO PURCHASE THE ACCUMULATED SHARES. OTHERWISE THE CORPORATION LOSES CONTROL OVER ITS OWN DESTINY AND RUNS THE RISK OF BEING FORCED INTO A TAKEOVER SITUATION AT A TIME THAT IS DISADVANTAGEOUS TO ITS SHAREHOLDERS. EXPERIENCE HAS PROVED THAT THE COMPANY THAT DOES NOT BUY BACK A 10-25% ACCUMULATION USUALLY FINDS ITSELF THE TARGET OF A TAKEOVER -- FREQUENTLY A TAKEOVER THAT DOES NOT TREAT ALL THE SHAREHOLDERS EQUALLY AND FAIRLY AND PREEMPTS THE ABILITY OF THE TARGET'S BOARD OF DIRECTORS TO ASSURE THAT THE BEST AVAILABLE DEAL HAS BEEN MADE. THE ACCUMULATION OF A MORE THAN 10% POSITION IS A DEVICE BY WHICH A RAIDER PREEMPTS FOR ITSELF ALL OR PART OF THE PREMIUMS USUALLY RECEIVED BY ALL THE SHAREHOLDERS UPON A NEGOTIATED MERGER. IT IS ALSO A DEVICE BY WHICH A RAIDER PREEMPTS THE ABILITY OF THE TARGET'S BOARD OF DIRECTORS TO DETERMINE THE DESIRABILITY, PRICE, FORM, AND TIMING OF A MERGER OF THE COMPANY -- A MATTER THAT EVERY STATE CORPORATION LAW COMMITS TO THE HANDS OF A COMPANY'S BOARD OF DIRECTORS. STUDIES SHOW THAT IN FAR MORE THAN 50% OF THE CASES WHERE CORPORATIONS

HAVE DEFEATED A TAKEOVER, THE SHARES SUBSEQUENTLY SOLD IN THE MARKET AT HIGHER PRICES THAN THE TAKEOVER PRICE. THUS, ONE MAY WELL ARGUE THAT, IN ADDITION TO THE RIGHT TO PROTECT THE LONG-TERM INTERETS OF THE TARGET'S SHAREHOLDERS BY AVOIDING A TAKEOVER SITUATION AND REMAINING INDEPENDENT, A TARGET HAS A DUTY SO TO DO EVEN IF IT INVOLVES PAYING A PREMIUM TO A GREEN-MAILER. THE CULPRIT IS NOT THE CORPORATION THAT PROTECTS ITS SHAREHOLDERS BY PURCHASING THE ACCUMULATED SHARES. THE CULPRI IS A REGULATORY SYSTEM THAT PERMITS ACCUMULATIONS IN EXCESS OF 10%.

ANOTHER TAKEOVER ABUSE THAT SHOULD BE ELIMINATED IS THE TWO-TIER-FRONT-END-LOADED BOOTSTRAP TAKEOVER SUCH AS THE MESA PETROLEUM TENDER OFFERS FOR CITIES SERVICE, GENERAL AMERICAN OIL AND GULF OIL. THEY ARE DEVICES THROUGH WHICH UNSOPHISTICATED SHAREHOLDERS ARE TAKEN ADVANTAGE OF BY PROFESSIONAL INVESTORS. THEY PRESENT A VERY SERIOUS THREAT TO OUR FREE ENTERPRISE CORPORATE SYSTEM. THEY SPAWN CORPORATE RAIDERS WHERE OTHERWISE NONE WOULD EXIST. THEY ARE DEVICES BY WHICH A TARGET'S OWN BALANCE SHEET IS USED TO FINANCE A RAID. OF NECESSITY, IF SUCCESSFUL, THEY CREATE HIGHLY LEVERAGED COMPANIES WITH ENORMOUS DEBT -- DEBT THAT MUST BE SERVICED BY LIQUIDATIONS AND REDUCTIONS IN CAPITAL EXPENDITURES. ALL OF WHICH COMES AT THE EXPENSE OF EMPLOYEES, CUSTOMERS, SUPPLIERS, COMMUNITIES IN WHICH THE COMPANIES OPERATE AND IN THE LONG RUN THE NATION'S ECONOMY AS A WHOLE.

TODAY, EVEN THE LARGEST AND MOST SUCCESSFUL COMPANY IS NOT IMMUNE FROM A FRONT-END-LOADED BOOTSTRAP RAID. THIS MEANS THAT MANAGEMENT ATTENTION MUST BE SHIFTED FROM LONG-TERM PLANNING TO RAID DEFENSE. WOULD WE RATHER CORPORATE MANAGEMENT FOCUS ON NEW PLANTS, NEW PRODUCTS, AND INCREASED EMPLOYMENT OR WOULD WE RATHER DIVERT THEIR ATTENTION TO THE LATEST SHARK REPELLANT CHARTER AMENDMENTS AND OTHER MEANS OF DEFENDING AGAINST CORPORATE RAIDERS? FOR MORE THAN 50 YEARS CONGRESS HAS BEEN IMPOSING PUBLIC RESPONSIBILITY ON BUSINESS CORPORATIONS. WE HAVE ANTITRUST, LABOR, ENVIRONMENTAL, CONSUMER SAFETY, OCCUPATIONAL SAFETY, PENSION AND A HOST OF OTHER LAWS THAT RECOGNIZE THAT CORPORATIONS HAVE RESPONSIBILITIES TO CONSTITUENCIES OTHER THAN THEIR SHAREHOLDERS. MOST ECONOMISTS TODAY RECOGNIZE THAT LONG-TERM PLANNING BY BUSINESS CORPORATIONS IS ESSENTIAL TO THE FUTURE HEALTH OF OUR ECONOMY. YET IN THE ONE AREA OF CORPORATE TAKEOVERS WE SUFFER THE STRANGE ANOMOLY OF THE GOVERNMENT, THROUGH THE SEC, ARGUING THAT ALL THAT COUNTS IS IMMEDIATE PROFITS TO SHAREHOLDERS; THAT CORPORATIONS SHOULD BE SUBJECT TO BOOTSTRAP RAIDS THROUGH FRONT-END LOADED TENDER OFFERS AND THAT CORPORATE DIRECTORS WHO SEEK TO DO LONG-TERM PLANNING AND SERVE THE LONG-TERM INTERESTS OF ALL THE CORPORATE CONSTITUENCIES SHOULD NOT BE PROTECTED BY THE BUSINESS JUDGMENT RULE. THE COURTS HAVE CONSISTENTLY AND REPEATEDLY REFUSED TO ACCEPT THIS ARGUMENT. I HOPE AND TRUST CONGRESS WILL DO THE SAME.

THERE IS A SOLUTION TO THESE TAKEOVER ABUSES. IT IS A STRAIGHTFORWARD LIMITATION ON ACCUMULATIONS TO NO MORE THAN 10%. IF SOMEONE WANTS TO ACQUIRE MORE THAN 10%, IT MUST BE BY A ONE-PRICE OFFER TO ALL THE SHAREHOLDERS. THIS SOLUTION DOES NOT INTERFERE OR CONFLICT WITH STATE CORPORATION LAW. IT DOES NOT RESTRICT THE FREE MARKET IN SECURITIES OR CORPORATE CONTROL. IT PRESERVES THE ABILITY OF THOSE WHO HAVE, OR WHO CAN RAISE ON THEIR OWN BALANCE SHEETS, THE CAPITAL TO MAKE A FAIR TENDER OFFER, TO ACQUIRE ANOTHER CORPORATION BY TENDER OFFER. IT ELIMINATES COMPLETELY THE FRONT-END-LOADED BOOTSTRAP TENDER OFFER. IT MAKES FAIR PRICE AND SIMILAR SHARK REPELLANT CHARTER AMENDMENTS UNNECESSARY AND WILL OBVIATE THE NEED FOR NEW STATE STATUTES, SOME OF WHICH MAY BE OF QUESTIONABLE CONSTITUTIONALITY, OF THE TYPE RECENTLY ENACTED IN OHIO, MARYLAND AND PENNSYLVANIA. FOR ALL PRACTICAL PURPOSES, IT ELIMINATES THE NEED FOR "PAC MAN" DEFENSES AND SELF-TENDER OFFERS IN RESPONSE TO FRONT-END-LOADED RAIDS. IT DOES NOT IN ANY WAY INTERFERE WITH THE RIGHT OF A TARGET'S BOARD OF DIRECTORS TO REJECT OR DEFEND AGAINST A TENDER OFFER. IT ALSO EFFECTIVELY ELIMINATES THE GREENMAIL PROBLEM. IF A RAIDER, OR GROUP OF RAIDERS, CANNOT ACCUMULATE MORE THAN 10% OF A TARGET'S SHARES, THERE IS NO REAL THREAT OF A CHANGE OF CONTROL TRANSACTION WITHOUT ALL SHAREHOLDERS BEING TREATED EQUALLY AND THEREFORE NO REASON FOR THE TARGET TO BUY BACK THE SHARES. IF THE TARGET WILL NOT BUY, THE GREENMAILER HAS NO INCENTIVE TO ACCUMULATE. I BELIEVE THAT THIS SOLUTION WOULD ELIMINATE MORE THAN 90% OF TODAY'S TAKEOVER PROBLEMS WITHOUT IN ANY WAY DISRUPTING THE FREE MARKET OR INTERFERING WITH STATE CORPORATION LAWS.

A DRAFT OF MY PROPOSAL IS ATTACHED.

PROPOSED AMENDMENT TO THE WILLIAMS ACT REQUIRING "FOLLOW-UP" BID FOR ALL OUTSTANDING SHARES

Introduction

The problems caused by accumulations of stock have been recognized for some time. Section 13(d) of the Securities Exchange Act of 1934 reflected the effort of Congress and the Securities and Exchange Commission to address one aspect of the problem: inadequate disclosure of accumulations of shares of publicly held corporations. Prior to the enactment of Section 13(d), stockholders had no ready means to learn of changes in control of a corporation through open market and private purchases. Section 13(d) requires persons accumulating stock to provide certain information with respect to, among other things, the amount of stock held and any plans to increase that amount.

The problems inherent in open market purchase programs have, however, evolved far beyond mere disclosure problems. Extremely rapid accumulations of stock on a large scale are now being effected by groups of investors despite the strictures of disclosure-oriented securities laws and antitrust waiting period requirements. In some cases, investors with access to large amounts of capital have acquired a sufficient number of shares to cause an effective transfer

OF CONTROL OF A PUBLICLY HELD CORPORATION BEFORE ANY COMPLIANCE WITH SECURITIES LAW DISCLOSURE REQUIREMENTS, OR ANTITRUST WAITING PERIOD REQUIREMENTS, IS TRIGGERED. THE SECURITIES AND EXCHANGE COMMISSION'S ADVISORY COMMITTEE ON TENDER OFFERS ADDRESSED SOME OF THESE ISSUES IN ITS JULY 1983 REPORT. THE COMMITTEE FOUND THAT "THE REQUIREMENTS TO REPORT THE ACQUISITIONS OF MORE THAN 5% OF AN OUTSTANDING CLASS OF AN ISSUER'S EQUITY SECURITIES ADOPTED UNDER SECTION 13(D) OF THE EXCHANGE ACT HAVE FAILED TO GIVE ADEQUATE NOTICE TO SHAREHOLDERS AND THE MARKET AT LARGE OF POTENTIAL CHANGES IN CONTROL OF THE ISSUER."

PROPOSED LEGISLATION

TO ADDRESS THESE PROBLEMS, AS WELL AS CERTAIN DISRUPTIVE AND INEQUITABLE TACTICS WHICH HAVE BECOME COMMON IN CORPORATE TAKEOVER PRACTICE, IT IS PROPOSED THAT THE SECURITIES EXCHANGE ACT OF 1934 BE AMENDED. THE PROPOSED LEGISLATION WOULD PREVENT THE ACQUISITION OF MORE THAN 10% OF THE OUTSTANDING SHARES OF VOTING STOCK OF A PUBLICLY HELD CORPORATION UNLESS THE ACQUIRING PERSON OFFERS TO PURCHASE ALL OF THE SHARES OF COMMON STOCK OF THE CORPORATION IN A TENDER OFFER. THE OFFER WOULD BE FOR CASH AT THE HIGHEST PRICE PAID BY THE ACQUIRING PERSON FOR ANY SHARES OF COMMON STOCK DURING THE PRECEDING TWELVE MONTHS OR, IF NO SHARES OF COMMON STOCK WERE

ACQUIRED DURING THE TWELVE-MONTH PERIOD, FOR CASH, SECURITIES OR A COMBINATION OF CASH AND SECURITIES (SO LONG AS EQUAL VALUE IS OFFERED FOR EACH SHARE).

THE OBJECT OF THE PROPOSED LEGISLATION IS TO ENSURE THAT, IF CONTROL OF A PUBLICLY HELD CORPORATION IS TO BE ACQUIRED, ALL OF ITS STOCKHOLDERS HAVE AN OPPORTUNITY TO SHARE IN THE PREMIUM THAT GENERALLY ATTACHES TO A SALE OF CONTROL. THE PROPOSED LEGISLATION WOULD AFFORD ALL STOCKHOLDERS ACCESS TO THE "CONTROL PREMIUM" BY REQUIRING THE FOLLOW-UP BID TO BE BY MEANS OF A TENDER OFFER.

UNDER THE PROPOSED LEGISLATION, ONCE 10% OF THE VOTING STOCK OF A CORPORATION HAS BEEN ACQUIRED, ALL HOLDERS OF COMMON STOCK MUST BE GIVEN THE OPPORTUNITY TO SELL THEIR SHARES. AS A RESULT OF THE PROPOSED LEGISLATION, STOCKHOLDERS OF A CORPORATION WHO ARE CLOSE TO THE MARKET, SUCH AS MARKET PROFESSIONALS, WOULD ENJOY NO ADVANTAGE OVER THE REST OF THE STOCKHOLDERS ONCE 10% OF THE VOTING STOCK HAS CHANGED HANDS.

THE REQUIREMENT THAT THE FOLLOW-UP BID BE FOR ALL OF THE OUTSTANDING SHARES AT A SINGLE PRICE WOULD ELIMINATE THE PRESSURE TO SELL CAUSED BY A PARTIAL BID, WHICH MAY STAMPEDE A CORPORATION'S STOCKHOLDERS INTO TENDERING THEIR SHARES DUE TO THE UNCERTAINTIES OF REMAINING MINORITY STOCKHOLDERS.

IT WOULD ALSO ELIMINATE "TWO-TIER" PRICING, WHICH OCCURS WHEN ONE PRICE IS OFFERED IN A TENDER OFFER FOR A CONTROLLING BLOCK OF STOCK, AND THEN A MUCH LOWER PRICE IS PAID FOR THE REMAINDER OF THE OUTSTANDING STOCK IN A SUBSEQUENT BUSINESS COMBINATION. TWO-TIER PRICING IS DESIGNED TO STAMPEDE STOCKHOLDERS INTO TENDERING THEIR SHARES OUT OF CONCERN THAT THEY WOULD BE FORCED, IF ENOUGH SHARES WERE TENDERED TO ENABLE THE WOULD-BE ACQUIROR TO ACCUMULATE A MAJORITY OF THE SHARES, TO ACCEPT THE LOWER PRICE PAID IN THE SECOND-STEP MERGER. THE PROPOSED LEGISLATION SHOULD PUT AN END TO THESE DISRUPTIVE AND INEQUITABLE TACTICS.

COMPARISON TO ADVISORY COMMITTEE RECOMMENDATIONS

THE TENDER OFFER ADVISORY COMMITTEE DEVELOPED TWO RECOMMENDATIONS DIRECTED SPECIFICALLY AT ABUSES WHICH OCCUR IN CONNECTION WITH OPEN MARKET AND PRIVATE ACCUMULATIONS OF STOCK. THE FIRST RECOMMENDATION WOULD ELIMINATE THE SO-CALLED "10-DAY WINDOW PERIOD" BETWEEN THE ACQUISITION OF MORE THAN 5% OF A CORPORATION'S SHARES AND THE OBLIGATION TO FILE A SCHEDULE 13D, BY REQUIRING THAT A SCHEDULE 13D BE FILED AT LEAST 48 HOURS PRIOR TO THE ACQUISITION OF MORE THAN 5% OF THE SHARES. ALTHOUGH CLOSING THE 10-DAY WINDOW PERIOD IS A DESIRABLE TECHNICAL AMENDMENT, IT MERELY ELIMINATES AN OBVIOUS LOOPHOLE IN A SYSTEM OF REGULATION PREMISED UPON ADEQUATE DISCLOSURE.

THE COMMITTEE'S SECOND RECOMMENDATION WOULD GO BEYOND DISCLOSURE TO REGULATE THE MEANS BY WHICH HOLDINGS IN EXCESS OF 20% OF THE OUTSTANDING SHARES MAY BE ACCUMULATED. UNDER THE SECOND RECOMMENDATION, ACQUISITIONS OF SHARES WHICH WOULD RESULT IN A PERSON HOLDING MORE THAN 20% OF THE VOTING POWER OF A CORPORATION'S STOCK MUST BE MADE BY MEANS OF A TENDER OFFER. AS RECOMMENDED BY THE COMMITTEE, THE "FOLLOW-UP" BID MAY BE A PARTIAL ONE, AS LONG AS IT IS A TENDER OFFER. THE THEORY OF THE COMMITTEE'S SECOND RECOMMENDATION IS THAT IF CONTROL PREMIUMS ARE BEING PAID, REQUIRING PURCHASES TO BE MADE BY MEANS OF A TENDER OFFER AFFORDS STOCKHOLDERS SOME OPPORTUNITY TO PARTICIPATE IN THE PREMIUM. THE COMMITTEE'S SECOND RECOMMENDATION DOES NOT, HOWEVER, ADDRESS THE OTHER HALF OF THE OPEN MARKET ACCUMULATION PROBLEM: THE UNCERTAINTIES FACED BY A MINORITY STOCKHOLDER WHOSE SHARES ARE ONLY PARTIALLY BOUGHT IN A TENDER OFFER (DUE TO PRORATION) OR WHO CHOOSES NOT TO TENDER ANY SHARES BECAUSE THE PRICE IS NOT SATISFACTORY.

THE PROPOSED LEGISLATION WOULD TAKE THE TENDER OFFER ADVISORY COMMITTEE'S SECOND RECOMMENDATION A STEP FURTHER BY REQUIRING THAT THE ACQUIRING PERSON PURCHASE ALL OF THE REMAINING OUTSTANDING SHARES IN A FOLLOW-UP TENDER OFFER. IN ADDITION, THE THRESHOLD TRIGGERING THE OBLIGATION TO MAKE A FOLLOW-UP BID IS SET AT 10% OF THE OUTSTANDING VOTING SHARES

IN THE PROPOSED LEGISLATION RATHER THAN THE 20% LEVEL SUGGESTED IN THE COMMITTEE'S SECOND RECOMMENDATION. THERE WAS CONSIDERABLE DISAGREEMENT AMONG THE COMMITTEE MEMBERS AS TO WHETHER A 10%, 15% OR 20% LEVEL SHOULD BE USED.

THE PROPOSED LEGISLATION USES A 10% THRESHOLD ON THE THEORY THAT ONCE THE PUBLIC MARKET BECOMES AWARE OF ACCUMULATIONS IN EXCESS OF 10%, MASSIVE TRANSFERS OF SHARES OFTEN OCCUR -- FROM THE GENERAL PUBLIC TO PROFESSIONAL ARBITRAGEURS -- SUCH THAT THE STOCKHOLDER BODY IS NO LONGER COMPOSED OF LONGER-TERM EQUITY HOLDERS, BUT RATHER CONSISTS IN LARGE PART OF MARKET PROFESSIONALS. THE RESULT, FAR TOO OFTEN, IS THAT A SALE OF THE CORPORATION IS FORCED MERELY BECAUSE THE NEWER STOCKHOLDERS ARE SEEKING TO TURN A QUICK PROFIT ON THEIR INVESTMENT AND NOT BECAUSE A SALE IS IN THE BEST INTERESTS OF THOSE HOLDING A LONG-TERM EQUITY POSITION. THE PROPOSED LEGISLATION WOULD ALTER THIS PROCESS BY REDUCING THE ARBITRAGE ADVANTAGE NOW AVAILABLE TO MARKET PROFESSIONALS WHO BUY AND SELL IN THE COURSE OF OPEN MARKET PURCHASE PROGRAMS AND ALLOW ALL STOCKHOLDERS TO PARTICIPATE IN THE TRANSFER OF CONTROL PREMIUM. THE USE OF THE 10% THRESHOLD ALSO, AS A PRACTICAL MATTER, ELIMINATES THE "GREENMAIL" PROBLEM. IF ACCUMULATION BEYOND 10% IS NOT POSSIBLE, TARGET COMPANIES WILL NOT BE CONCERNED ABOUT CREEPING TENDER OFFERS AND WILL NOT BE FORCED TO PAY PREMIUMS IN ORDER TO PROTECT THEIR SHAREHOLDERS BY RANSOMING

THEIR STOCK FROM THE HANDS OF A RAIDER SEEKING TO PROMOTE THE RAIDER'S SELF INTEREST NOT THE INTEREST OF THE TARGET'S SHAREHOLDERS.

PROPOSED AMENDMENT TO SECTION 14 OF THE SECURITIES EXCHANGE ACT OF 1934

(1) IT SHALL BE UNLAWFUL FOR ANY PERSON, DIRECTLY OR INDIRECTLY, BY USE OF THE MAILS OR BY ANY MEANS OR INSTRUMENTALITY OF INTERSTATE COMMERCE OR OF ANY FACILITY OF A NATIONAL SECURITIES EXCHANGE OR OTHERWISE, TO ACQUIRE OR AGREE TO ACQUIRE ANY SHARES OF ANY CLASS OF VOTING EQUITY SECURITIES OF A CORPORATION REGISTERED PURSUANT TO SECTION 12 OF THIS TITLE, OR ANY SHARES OF ANY CLASS OF VOTING EQUITY SECURITIES OF AN INSURANCE COMPANY WHICH WOULD HAVE BEEN REQUIRED TO BE SO REGISTERED EXCEPT FOR THE EXEMPTION CONTAINED IN SECTION 12(G)(2)(G) OF THIS TITLE, OR ANY SHARES OF ANY CLASS OF VOTING EQUITY SECURITIES ISSUED BY A CLOSED-END INVESTMENT COMPANY REGISTERED UNDER THE INVESTMENT COMPANY ACT OF 1940 IF, AFTER CONSUMMATION THEREOF, SUCH PERSON WOULD, DIRECTLY OR INDIRECTLY, BE THE BENEFICIAL OWNER OF VOTING EQUITY SECURITIES WHICH WOULD ENTITLE SUCH PERSON TO CAST 10 PERCENT OR MORE OF THE VOTES THAT ALL HOLDERS OF OUTSTANDING VOTING EQUITY SECURITIES WOULD BE ENTITLED TO CAST IN AN ELECTION OF DIRECTORS OF THE ISSUER, UNLESS SUCH ACQUISITION SHALL BE BY MEANS OF A TENDER OR EXCHANGE OFFER FOR ALL OF

THE OUTSTANDING SHARES OF COMMON STOCK OF THE ISSUER (INCLUDING ALL SHARES OF COMMON STOCK ISSUABLE UPON CONVERSION OR EXERCISE OF OUTSTANDING SECURITIES, WARRANTS, OPTIONS OR OTHER RIGHTS ISSUED OR GRANTED BY THE ISSUER) EITHER (I) FOR CASH AT A PRICE PER SHARE EQUAL TO THE HIGHEST PRICE PER SHARE (INCLUDING ANY BROKERAGE COMMISSIONS AND SOLICITING DEALERS FEES) PAID BY SUCH PERSON FOR SHARES OF COMMON STOCK OF THE ISSUER DURING THE TWELVE MONTHS PRECEDING THE DATE OF COMMENCEMENT OF THE OFFER, OR, (II) IF SUCH PERSON HAS NOT PURCHASED ANY SHARES OF COMMON STOCK OF THE ISSUER DURING THE TWELVE MONTHS PRECEDING THE DATE OF COMMENCEMENT OF THE OFFER, FOR CASH, OR FOR SECURITIES, OR FOR ANY COMBINATION OF CASH AND SECURITIES, PROVIDED THAT IN ANY OFFER IN WHICH CASH IS OFFERED FOR PART OF THE COMMON STOCK OF THE ISSUER THE SECURITIES OFFERED FOR THE REMAINING COMMON STOCK HAVE A FAIR MARKET VALUE, ON A FULLY DISTRIBUTED BASIS, PER SHARE OF COMMON STOCK OF THE ISSUER AT LEAST EQUAL TO THE AMOUNT OF THE CASH OFFER PER SHARE OF COMMON STOCK OF THE ISSUER.

(2) FOR PURPOSES OF THIS SUBSECTION, THE TERM "VOTING EQUITY SECURITY" SHALL MEAN ANY EQUITY SECURITY OF A CORPORATION THAT ENTITLES THE HOLDER THEREOF TO VOTE GENERALLY IN AN ELECTION OF DIRECTORS OF THE CORPORATION.

(3) WHEN TWO OR MORE PERSONS ACT IN CONCERT OR IN A COORDINATED MANNER OR AS A PARTNERSHIP, LIMITED PARTNERSHIP,

SYNDICATE, OR OTHER GROUP FOR THE PURPOSE OF ACQUIRING, HOLDING, OR DISPOSING OF SECURITIES OF AN ISSUER, OR INFLUENCING THE MANAGEMENT POLICIES OF AN ISSUER, SUCH SYNDICATE OR GROUP SHALL BE DEEMED A "PERSON" FOR PURPOSES OF THIS SUBSECTION.

(4) THE PROVISIONS OF THIS SUBSECTION SHALL NOT APPLY TO:

(A) ANY PERSON THAT ON THE EFFECTIVE DATE OF THIS SUBSECTION (THE "EFFECTIVE DATE") BENEFICIALLY OWNS VOTING EQUITY SECURITIES OF A CORPORATION WHICH WOULD ENTITLE SUCH PERSON TO CAST 10 PERCENT OR MORE OF THE VOTES THAT ALL HOLDERS OF OUTSTANDING VOTING EQUITY SECURITIES WOULD BE ENTITLED TO CAST IN AN ELECTION OF DIRECTORS OF THE CORPORATION UNLESS, SUBSEQUENT TO THE EFFECTIVE DATE, SUCH PERSON INCREASES ITS BENEFICIAL OWNERSHIP OF VOTING EQUITY SECURITIES OF THE CORPORATION TO A PERCENTAGE IN EXCESS OF THE PERCENTAGE OF OUTSTANDING VOTING EQUITY SECURITIES OF THE CORPORATION BENEFICIALLY OWNED BY SUCH PERSON ON THE EFFECTIVE DATE;

(B) ACQUISITIONS OF ANY VOTING EQUITY SECURITY BY THE ISSUER OF SUCH SECURITY;

(C) ACQUISITIONS OF ANY VOTING EQUITY SECURITY FROM THE ISSUER OF SUCH SECURITY;

(D) ACQUISITIONS OF VOTING EQUITY SECURITIES PURSUANT TO AN AGREEMENT WITH THE ISSUER UNDER WHICH ALL OF THE

OUTSTANDING SHARES OF COMMON STOCK OF THE ISSUER (INCLUDING ALL SHARES OF COMMON STOCK ISSUABLE UPON CONVERSION OR EXERCISE OF OUTSTANDING SECURITIES, WARRANTS, OPTIONS OR OTHER RIGHTS ISSUED OR GRANTED BY THE ISSUER) ARE TO BE ACQUIRED;

(E) ACQUISITIONS OF VOTING EQUITY SECURITIES OF ANY ISSUER THAT ON THE EFFECTIVE DATE IS A SUBSIDIARY OF ANY OTHER CORPORATION BY SUCH OTHER CORPORATION. FOR PURPOSES OF THIS SUBSECTION, "SUBSIDIARY" SHALL MEAN ANY ISSUER AS TO WHICH ANOTHER CORPORATION BENEFICIALLY OWNS VOTING EQUITY SECURITIES THAT WOULD ENTITLE SUCH CORPORATION TO CAST AT LEAST 50 PERCENT OF THE VOTES THAT ALL HOLDERS OF OUTSTANDING VOTING EQUITY SECURITIES OF THE ISSUER WOULD BE ENTITLED TO CAST IN AN ELECTION OF DIRECTORS OF THE ISSUER; OR

(F) EXISTING HOLDERS OF VOTING EQUITY SECURITIES OF AN ISSUER ACTING IN CONCERT OR IN A COORDINATED MANNER FOR THE PURPOSE OF SOLICITING PROXIES FROM OTHER HOLDERS OF VOTING EQUITY SECURITIES OF THE ISSUER OR OTHERWISE SEEKING TO INFLUENCE THE MANAGEMENT POLICIES OF THE ISSUER, PROVIDED THAT NO SUCH EXISTING HOLDER HAS ACQUIRED ANY VOTING EQUITY SECURITY OF THE ISSUER OTHER THAN AS SET FORTH IN PARAGRAPH (4)(A) OF THIS SUBSECTION.

Mr. WIRTH. Thank you very much, Mr. Lipton. We reviewed that with great interest. We appreciate your being here.

Mr. Wasserstein, also a member of the advisory committee.

STATEMENT OF BRUCE WASSERSTEIN

Mr. WASSERSTEIN. Thank you very much, Chairman Wirth.

I have submitted a formal statement.

Mr. WIRTH. It will be included in full in the record.

Mr. WASSERSTEIN. Thank you very much.

Well, following Mr. Lipton is always difficult. I am not going to match his rhetorical flourishes. After listening to Mr. Norris and the State people, and Mr. Lipton, you come to the conclusion that people who are against takeovers are against takeovers. Now, of course, there is a lot of rhetoric, a lot of labels, but basically you have a tautology. Under the euphemism of shareholder protection, you have a lot of excuses for company protection.

My problem is that I am trying to balance the competing interests: the companies defending themselves, the investor interests, the companies who want to go after other companies, the interests of small companies who want to go after large companies whose management they do not think is particularly effective, the people who want to go into proxy fights, all very disparate groups.

The consensus of the committee was to come out with a balanced approach. That is why you have in the end this point of view that what you needed was a coherent set of recommendations, that you could not take any one or two of them out of context, because you do have this seesaw type of effect. Many of the problems that were being talked about this morning by the State people that an inefficient factory may be closed down are the arguments that other people make on why takeovers are good.

We are trying to think what works, what makes sense, what approaches fundamental fairness. Before going on, I should mention one other fact. If you notice, there is a commonality with most of the testimony. What you are lacking is data, data, data. What you have is a lot of suppositions, no empirical facts. If you look at any of the studies that are talked about, you will find the closest analogy is a piece of Swiss cheese.

This is an area where your views are very subjective, where you have got to take a long-term perspective of things.

Now, I think the rethinking of policy toward the tender offer rules is timely and important, and I believe that today our whole system is a pastiche of bandaid solutions. We do need a systemic and balanced overhaul. Unfortunately, we cannot hope for panaceas, but we can do a lot better.

I, however, must react to the Commission's position on the advisory report with some disappointment. While endorsing the spirit of the report, the Commission is equivocal about implementing some of the most important recommendations. I would urge a bolder approach.

My comments have one central theme. The prerogative of access for both the investor and the corporation to the national marketplace is a privilege which must also bear responsibilities. The Com-

State law. And it does not depend on the circumstance. The wisdom of dealing with it may, but not as to the capability of dealing with it.

Mr. LIPTON. But the power in Congress is beyond question. Congress has the power to preempt State regulation in this area. The question is whether Congress wishes to exercise that power.

Indeed, the questions have become whether Congress needs to exercise that power. It may be that the devices that we are talking about would disappear if the tactics that have given rise to them were eliminated.

Mr. WASSERSTEIN. And you understand that in the logic of management, if you get an offer for all shares that you regard as an excessively low price, you will regard that as a stampeding offer nevertheless. All tender offers, as we said, are coercive. Unless these protective provisions are banned, we are still going to have many of the same reactions toward the defensive side. You are still going to be thinking about the crown jewels, you are still going to be saying, that in the long term you may be getting a higher price.

These rationales are not just colorable, there is some substance to it. In other words, the mere fact that someone says I am going for all the shares does not really change the logic behind these defenses. When the committee went through all this and balanced some of these considerations, as I say, what became clear is that we should try a balanced approach based on our own current system first. Try those remedies, see if it works for three years or whatever. If it does not, we have another hearing, we come back, and we get a modified British system —and everybody was in favor of that. Why you would leap toward the British system now, when it inherently, on its face, has a major element of being, in effect, a protective device is highly unclear, especially when there is no firm position and such contradictory opinion as to what goes with the British type legislation, whether you do really eliminate the crown jewel defenses and the Pac-Mans and all this sort of thing.

Mr. BRYANT. Thank you.

Mr. Oxley.

Mr. OXLEY. In the fall of 1981, Mr. Icahn, my home community of Findlay, OH went through a very traumatic experience, and that was when Mobil announced their takeover attempt of Marathon Oil Co.

First of all, I do not think you had anything to do with that in any direct or indirect way. But I would be interested in your comments on that, particularly when we were concerned not only about the 2,500 white collar jobs that existed in a town of 38,000 people and the potential loss of those jobs, and what it would mean to the local economy, but what it would mean to similar communities facing that kind of takeover.

Mr. ICAHN. Well, first of all, I would like to question what happened. Did the town—did everybody lose their jobs in that town, or did they keep it going, or what?

Mr. OXLEY. Well, as you know, because of the constraints put on Mobil by the Justice Department and ultimately by a Federal court in Cleveland, Mobil was——

Mr. ICAHN. Yes; was constrained.

Mr. OXLEY. And then, of course, United States Steel, the white knight, came in. I think it is very clear, however, that had that series of events not taken place, Marathon would have preferred, and I think the stockholders and the community certainly would have preferred, that Marathon remain an independent company instead of being taken over by a white knight.

Given the two alternatives of an adverse takeover by Mobil and a white knight type of takeover by United States Steel, the choice was very obvious.

Mr. ICAHN. Yes, but again, what I say is that if you take an overall objective view of the question at hand, I think what you want for the country, if you are looking ahead, is the most productivity you can have. In the long run of things, you have to maximize the use of assets in a country or any way you look at it.

Now, occasionally, a merger or a takeover will result in a loss of jobs, but also I would say this: that I always read the newspaper. When you get a dip in the economy or when a company is not doing well, I see Ford or General Motors or Chrysler, for that matter, lays off 10,000, 20,000, on 30,000 people, nobody says too much, nobody criticizes it.

Suddenly, if somebody takes over a company that is not doing well and would probably have had to do——

Mr. OXLEY. Are you assuming that Marathon was not doing well?

Mr. ICAHN. Maybe I am. Usually when there is a takeover of this type, usually the assets, for some reason, could be more productive. I mean that is generally the case. I really do not know much about Marathon, so I cannot really talk to the specifics of that.

Generally, if the company is doing pretty well, though, generally speaking, there are not an awful lot of layoffs, and the layoffs are really getting rid of some of the fat that is not productive for society. In other words, you have people working in jobs over the years, which is what I am bringing out, where management has put layers and layers on because they really do not care about the company that much. They are looking at it, not from the point of shareholders.

Generally speaking, if a company is doing well and taken over and merged, I really do not think there are an awful lot of layoffs in there. It is only when you have a steel company that is laying off anyway.

For instance, you have had steel companies laying off a lot of people anyway, whether there is a merger or not, and in fact, very often, some of these mergers keep the company alive. So rather than bring on unemployment, it sometimes perpetuates employment because by doing the merger and infusing new capital, you keep some of these companies alive.

I cannot speak to the one that you are talking about, but I think generally speaking mergers per se are not bad. If you want to go into specifics and say if it is too big of a company, too big of a merger, I am not that expert in that. I am just saying, in general, a merger——

Mr. OXLEY. There are mergers and there are mergers. There are hostile mergers, hostile takeovers, and I think clearly the Mobil/Marathon situation was indeed a classic example of a hostile takeover or at least a takeover attempt, as opposed to some of the other

mergers that are being proposed, for example, in the steel industry that are not hostile takeovers and indeed would provide, in many cases, economies of scale, more productivity, a better company, more competition, and ultimately more jobs.

Mr. ICAHN. That is a good point. Let me ask you this. Do you believe that—let's say you have nonhostile mergers in the steel industry. Do you think there would be no layoffs?

You are talking about economies of scale. What does that mean? That means layoffs.

Mr. OXLEY. I think layoffs in those situations would have occurred anyway, and I think in the long term, by providing greater health to the steel industry, particularly in light of foreign competition, that we have indeed strengthened the industry, and as a result will ultimately at least provide maybe not for more jobs, but certainly will stop the bleeding.

At least that is my own personal opinion.

Mr. LIPTON. Mr. Oxley, I would like to suggest that in whatever legislation Congress considers, that very careful consideration be given to not exalting the interest of short-term profits to shareholders, particularly shareholders who happen to be such because of purchase of shares in expectation of precipitating a takeover, over the other constituencies of large American corporations.

There are other people concerned: the communities, the customers, suppliers, employees, and so on. And none of us know where to draw the line, but we do feel, I think—at least I feel very strongly that we should not lose sight of all these other interests just because it is felt that shareholders should have an opportunity to profit at a given point in time.

Mr. OXLEY. I appreciate those comments, having come through that kind of experience in my hometown. Believe me, those comments are most appreciated because that was a very, very difficult period for us, and your group——

Mr. WASSERSTEIN. Yes. I lived in Findlay, OH, and I had very many memorable experiences there.

Mr. OXLEY. It was nice to have you there.

Mr. WASSERSTEIN. And it worked out well. I mean the fact is, in hindsight, given that there was a takeover, as you say, I think the community was specifically protected.

And I think one interesting aspect about it, of course, is that the deal that allowed that protection was indeed one of these front-loaded deals, and, in fact, in the front-loaded deal, over 90 percent of the people subscribed. It was prorated. The back end was at a lower level. Its value fluctuated——

Mr. LIPTON. But front-loaded to compete with Mobil.

Mr. WASSERSTEIN. Absolutely.

Mr. OXLEY. Are you talking about the United States Steel offer or the Mobil offer?

Mr. WASSERSTEIN. The United States Steel offer was a front-loaded offer. The point is, a lot of these things depend upon the circumstance. And the difficulty on the efficiency argument is when you do a steel deal and you think it is efficient, there is no more reason to say that the friendly steel deal is going to be inherently more efficient or less efficient than the hostile steel deal.

The question of whether a deal in an industry like the oil industry should be done is an antitrust question which is a different issue. But as far as hostile deals being better or worse on the efficiency side, there is just no basis to draw the distinction.

Mr. LIPTON. Now, I might point out that the Cities Service people in Tulsa, OK were not as lucky.

Mr. OXLEY. That is correct.

Mr. ICAHN. Do you have any reason to believe that if Marathon had taken over Mobil—if Mobil had taken over Marathon, as opposed to United States Steel, do you feel that they would have closed the town and there would have been much of a difference?

Mr. OXLEY. Absolutely. There is no question in my mind. Why would Mobil Oil, headquartered in New York City, want to keep a headquarters with a duplication of jobs that would clearly be there? Why would they want to stay in the sticks of Findlay, OH when they have already got their setup in the Big Apple? It would be very, very easy to do.

There is no question in my mind. I asked that directly to the CEO at Mobil when the takeover attempt occurred, and he could not give me a direct answer. In fact—all he could say was, well, we will take care of Findlay. Well, I don't know what the hell that meant, but I did know that he was going to take care of us, and not in the best sense of the word.

So I think that, as Mr. Lipton pointed out, there are other factors here involved. Interestingly enough, 3 years later, there is still some litigation going on with disaffected shareholders whose claims have not been determined under Ohio law. So we have that tale still with us.

I happen to think, based on what I saw, that Marathon was extremely lucky in getting a favorable antitrust ruling from the court in Cleveland, which in turn slowed down Mobil to the point where United States Steel was able to come in.

And United States Steel happened to be in the right place at the right time, or maybe Marathon was, so that things kind of came together. And, in fact, that marriage has worked out fairly well. The United States Steel decision to allow Marathon to produce has been a good one. Marathon has now produced 52 percent of the revenues for United States Steel, to the point where United States Steel is no longer a steel company; they are indeed an oil producer.

So things have worked out pretty well. I happen to think that we are awfully lucky, and one of the things that we tried to do afterwards was come up with some kind of legislation that would keep that type of thing from happening in the future, while still permitting the free flow of decisions in the marketplace. It is a difficult thing to do, as Mr. Lipton pointed out.

Mr. LIPTON. Mr. Wasserstein wants the record to note that it was good advice, not luck.

Mr. OXLEY. Well, they were paid well for that advice, I will say that.

Mr. BRYANT. Any further questions?

I would like to thank all of you on behalf of the subcommittee for coming here and helping us become educated about a difficult area and enduring record votes and other interruptions that are an inevitable part of our process here.

APPENDIX

1984's Major Mergers and Acquisitions Completed or Near Completion as of April 26, 1984

	Buyer	Target	Amount
1.	SOCAL	Gulf Oil	$13.4 billion
2.	Texaco	Getty Oil	10.1
3.	Mobil	Superior Oil	5.7
4.	Boston Ventures Mgmt.	Metromedia	1.2
5.	Warner Communications	Polygram Records	1.0
6.	Republic Steel	LTV	770 million
7.	U. S. Steel	National Steel	575
8.	Kelso & Co. group	U. S. Industries	533
9.	U. S. Steel Marathon	Husky Oil's U. S. unit	505
10.	Icahn group	ACF	469
11.	Mgmt. group	Harte Hanks	445
12.	Equitable Life Ins.	General Growth properties	425+
13.	Homestake Mining	Felmont Oil	400
14.	Damson Oil	Dorchester Gas	392
15.	U. S. Gypsum	Masonite Corp.	380
16.	Investor group	Kaiser Steel	375
17.	Gulf Broadcast	Conwood Corp.	373
18.	Shearson/Amex	Lehmann Bros.	360
19.	Digital Switch	Granger	358
20.	Emerson Electric	Smith Kline bus. group	320 (est.)
21.	Imasco	Peoples Drug	320
22.	Mgmt. group	Southwest Forest Inds.	312
23.	McDonnell Douglas	Tynshare	308
24.	Victor Posner	National Can	270
25.	Peabody Holding	Armco Coal props.	257
26.	Distillers Co.	Somerset's Esmark unit	250
27.	Chesapeake Finan.	Royal Crown Cos.	241 (est.)
28.	Joy Mfgr.	ACF's WKM division	230
29.	Cibra Corp.	AFIA	215
30.	GE	Patrick Petroleum Assets	202
31.	Rancher Exploration	Hecla Mining	200
32.	Cross & Trecker	Allied's Bendix Automation Group	200 (est.)

Mr. WIRTH. Thank you very much, Mr. Brobeck.

Let me ask the members if they have statements that they might like to make at this point.

Mr. Oxley.

Mr. OXLEY. Thank you, Mr. Chairman. I apologize for being late, and appreciate having the opportunity to make an opening statement.

Mr. WIRTH. We will include whatever statement you would like, in full, in the record at the start, without objection.

Mr. OXLEY. Thank you, Mr. Chairman.

I want to welcome our distinguished witnesses here today for what promises to be a most enlightening hearing. I especially want to welcome Prof. Morgan Shipman from my alma mater, Ohio State University College of Law. Professor Shipman's expertise in the areas of corporate law and Federal taxation are unparalleled, in my opinion, and I certainly look forward to hearing him today in the question and answer session.

I was forced quite early in my congressional career to come to grips with the complex area of corporate mergers and takeovers. Shortly after my coming to Congress in a special election in the summer of 1981, Mobil announced its intention to take over Marathon Oil which is located in my hometown of Findlay, OH. Fortunately, through the efforts of many of us, Marathon was able to fend off the hostile tender offer and was, instead, taken over by a white knight, United States Steel. A hostile Mobil takeover would have spelled economic doom for the town of Findlay, OH, population 38,000—2,500 of them employees of Marathon Oil—as Mobil would have had absolutely no incentive to keep Marathon's headquarters there. As a matter of fact, during the period that it was at its most difficult, literally no automobiles or houses sold in the city of Findlay, and it was a very, very tough situation for all of us. Luckily, through the United States Steel acquisition, Marathon has managed to stay in Findlay and has become a quite substantial part of United States Steel's operation; as a matter of fact, last year providing over 50 percent of United States Steel's earnings.

So, fortunately, my early baptism by fire in the area of corporate mergers had a happy ending. But it was a long, grueling process and a touch-and-go situation for some time, both for me and, ultimately, for my constituents, and one which none of us would prefer to go through again.

In light of the Marathon situation, my interest in takeovers has, indeed, been piqued to say the least. I look forward to a full and frank discussion of the issues this morning.

I thank you, Mr. Chairman.

Mr. WIRTH. Mr. Bryant, do you have any opening comment you might like to make?

Mr. BRYANT. I would just like to commend you, Mr. Chairman, for continuing these hearings—the second set of hearings—on this matter of tender offers and takeovers. And I'm pleased to join you and other members of the subcommittee in sponsoring legislation to correct some inequities which I think have come to light in testimony today.

Not dealt with very succinctly by anybody in testimony today but still a part of this hearing is the Uniform Foreign Margin Require-

on the National Securities Exchanges in the over-the-counter market, and that the Federal interest, having been asserted in the Williams Act, should preempt virtually all State court—State legislative—capacity to disturb the balance that the Congress has, over the years, not only tried to strike but maintain between bidders and defenders. And there is a lot of room for mischief if you defer too much to the States. So, I think the chairman's point, the suggestion in his question, is quite right. If there is a problem, perhaps it ought to be cured at the Federal level rather than leave to the States a variety of different solutions, some of which may, by the choice of words or turn of a phrase turn out to be a little bit more than simply more time.

And then, separately, as Mr. Longstreth suggests, the question of more time needs to be seen as part of the seamless web that Monfuller would love if he had seen.

Mr. WIRTH. Mr. Oxley.

Mr. OXLEY. Thank you, Mr. Chairman.

I was reviewing in my mind the events that took place during the whole Marathon takeover battle, and I particularly want to ask members of the panel: Is there anybody on the panel who doesn't think that each State has a legitimate interest in, not necessarily protecting, but at least looking out for the best interests of some of its most prominent corporations? In the case of Ohio, Marathon, of course, is an example, but there are other examples, as well—Owens-Illinois, Procter & Gamble, and others. Is there anybody on this panel who thinks the States have no legitimate interest in providing some kind of facility for a company that is under attack to protect itself, or to in some way hold off a corporate raider until such time as the board and, ultimately, maybe even the shareholders, can make sense of the whole operation, and come to a reasonable conclusion? Is there anybody on this panel that just absolutely takes the opposite side of what I do?

Actually, Mr. Shipman, I would be interested in your comments.

Mr. SHIPMAN. Yes. I'd like to respond.

You're basically making the argument that Justice Powell has tried to focus on. Only five judges formed the majority in the *Mite* case. Justice Powell made just the comment that you did, that in voting with the majority, he wished to note that it was a very legitimate thing for a State to look at the considerations you mentioned.

Congress has powers to determine who will regulate whether it's the States or the Federal Government. That's been done in the McCarran-Ferguson Act, and in numerous other acts. Your power is clear—*Green* v. *Santa Fe* held that, by and large, most corporation law is State law and that only where Congress expressly states otherwise will there be anything that will displace State law.

I don't find it odd that a Delaware court in the Royal Dutch Shell issued that opinion. It's a good opinion. You should get it and read it. The disclosure that the SEC did not pull out that should have been pulled out. And the Delaware courts have just as much experience as the Federal courts. Many of these State courts have just as much experience. State regulation is a very legitimate thing, and more time leads to more competitive bids and fewer cheap tender offers. You do get fewer tender offers; those you get

are better. It's like Mr. Greenhill said, it's as simple as day and night: more time, more disclosure, you're going to have fewer cheap offers. Those that you have are going to be better. And that's what I want, an informed market for people to operate in, and we don't have three tender offers a day.

Mr. OXLEY. If I could just comment on that. And then I see that a couple of you gentlemen want to speak.

I saw it happen. I saw the fear in people's eyes. My father was a stockholder in Marathon Oil, and he was put in the very, very difficult position of having to make a decision very quickly, as it not only affected him as a stockholder but it affected him as a citizen of Findlay and of Ohio. It was a very, very difficult situation to be in for an individual stockholder, to try to make that determination.

Mr. ELICKER. I have two points. One has to do with time. The importance of time I don't think we should overlook, is that the time, perhaps, required for any complexity in a supercharged public situation, like Marathon Oil, can be very different from the time required for a small, not highly rated company. We need to protect them, too. But the Marathon Oil Co., might well be besieged with offers. A small, inherently lesser type of company, perhaps, their shareholders need some protection, too, and the time may be more of a factor for them than it might be for a company where the bids float in because of fashionableness.

I would like to underline separately what you are saying. I think the word "constituency" is important here. A modern corporation has a lot of constituencies. The shareholder, the individual is one, but the average corporation has a lot of other things to consider. Community is one. They'd better be concerned about their employees. If they expect loyalty from the employees, they've got to give a certain loyalty to the employees' interests. In that you have the community, you have customers—you'd better think about the customers if we're going to be internationally competitive. And, of course, you've got the interest of economic society at large, as to whether these offers are good for society or not.

They are very complex questions and there are a lot of complex constituencies here, and it isn't just the shareholder, particularly the small shareholder who is not a majority owner of a larger corporation today, who has the only constituency to be served.

Mr. OXLEY. Mr. Andersen.

Mr. ANDERSEN. Well, I think we've got a couple of issues here. First of all, there is some legitimate interest of the State. The question is whether it is the State of Ohio or the state of the Union. I can't tell you which State should govern in a given situation, whether it should be the State where the headquarters is, whether it is where the corporation is incorporated, whether it is where it has most of its assets, or where it has the greatest number of employees. What if assets are balanced between two States? I can't even tell you what a corporate headquarters is within this context. You might wind up worrying about this.

I think if we have 50 different people out there, each vying for some way to become the most favorable to one side or the other. In a situation like this we've got chaos. We've got to run the whole system, No. 1.

No. 2, I would like to ask the question: In the case of Marathon, what if the management of Marathon had gone out and done a friendly deal with somebody who had moved the headquarters from the State of Ohio. Shouldn't a friendly merger have the same sort of consideration given to it. I don't think that the issue should be if it is friendly or unfriendly at all. In fact, I think that it should be viewed—that these constituencies should be viewed—in a totally different arena altogether.

Mr. OXLEY. What would you suggest to deal with that latter situation?

Mr. ANDERSEN. I think we'd deal with it with the same kind of regulatory environment that we're looking at now. I believe that in the final analysis the employment of the assets is going to be done relatively more efficiently by the marketplace than by anything you and I can sit here and try to think of in anticipation of it ourselves.

Mr. OXLEY. So they should be treated equally, the hostile takeover and the so-called decision——

Mr. ANDERSEN. I don't see any difference. The difference is price.

Mr. OXLEY. Let's take that, then, if I can. We're dealing with the hostile takeover, the Mobil situation, versus a decision by the Marathon board to move to Houston, TX. I gather you treat those equally in your mind.

Mr. ANDERSEN. I don't see where the difference is. I think they're both economic decisions that are made by people trying to practice the deploying of assets through sufficient mechanisms. And I think just the attitudes of the various constituencies and the rights of the various constituencies shouldn't be any different in one of those situations than the other.

Mr. OXLEY. In the Mobil situation, what if you were living in Findlay, OH—let's say you were a retired Marathon employee, or, indeed, you were a widow who had received some Marathon stock as a result of the estate, and you were looking at the distinct possibility that if the hostile takeover were successful, that there would literally be no headquarters in Findlay, OH, that you would not have 2,500 employees, and that it would wreak havoc on the entire social and economic structure of the community of 38,000 people. Wouldn't your attitude be somewhat different under those circumstances?

Mr. ANDERSEN. I think it would have been different in Gloversville, NY, too, but I don't know that I can say that those people are entitled, for the rest of their careers, to be insured employment.

Well, I think that what I have to rely upon is that if the people of Findlay, OH, had liked that company and had placed their economic well-being with that company, that they also would own a significant amount of that company. That capital that would be freed up and an opportunity freed up by moving something out that might be more efficiently employed elsewhere. By moving a new idea, new opportunities and new enthusiasms, the state of that marketplace might be akin to what's happened to Boston. Boston has become a Northeastern city which has a growing employment and population statistic because, in previous economic crises, they moved out a lot of their industry, which was basic industry. It's a much more efficient and vibrant operation today than if we'd tried

to force those people to stay there and continue making shoes in Boston and gloves in Gloversville, NY.

I think the economic process dislocates, but the nice thing about the tender process is that in that dislocation, at least you create a large pool of liquid capital. And if there are people in Findlay, OH, who really backed that company then you've made people wealthy in liquid, cash capital. They have the ability to figure out and use some ingenuity to redeploy and make that community perhaps even more vital in the future than it has been in the past.

Mr. OXLEY. That is very sanguine.

Mr. ANDERSEN. I come from Detroit originally, and I've seen a couple of cycles there. And I don't know how to protect myself from others other than to have a great deal of faith. But I know how they deployed that one.

Mr. OXLEY. Mr. Lowenstein.

Mr. LOWENSTEIN. Yes. I understand your problem, I think. Mr. Andersen is saying that we have to move those assets into the most efficient hands. And I suspect that your concern about the Mobil-Marathon transaction was not simply that this company Marathon, ran the risk of being moved elsewhere, but rather the fact that this was a well-managed company. By all accounts Marathon was a superbly managed organization; return on equity averaged over 20 percent a year. It had a better return on equity than Mobil Corp. By that analysis, it should have bought Mobil rather than vice versa.

If I were to change the scenario slightly, and I would give you a business in Findlay, OH, that would be poorly run, I think, under those circumstances I would prefer to see the company taken over. I would suggest that the concern is not so much with preserving State jurisdiction over tender offers but with the fact that Mr. Munger has alluded to, and also Mr. Rohatyn—that we seem to be buying and selling Marathons, good companies, good resources, well managed, to no economic gain.

Mr. OXLEY. Mr. Greenhill.

Mr. GREENHILL. I think if you are a citizen of Findlay, OH, there is nothing that you can say when you start talking about the situation that is not painful. I think that you have to start there, and I think it is fine, from an economic point of view. Because I basically agree with Mr. Andersen, you've got to look at how the free market operates and so forth. But it is painful when it starts with real people and people you and I both know. It is very, very painful.

The problem I have with saying that a well managed company—and I refer to Marathon as a good company—what is it they didn't do that got them in a situation in which this became possible?

And to move away from Marathon and generalize, I think it becomes very anecdotal to keep talking about one or two situations. Many companies have assets which are under valued. And no matter what the management does, if they only run the business from day to day, they're never going to develop the volume to shareholders unless they look to more value. In the case of Marathon, they had an incredibly valuable asset in the Yates Field. And running the business as usual in the Yates Field, there was no way the shareholders were ever going to get paid off.

Now, they didn't have to wait until Mobil came along. They could have talked about other ways of realizing the value of the Yates Field. They didn't. And I think many other companies have the same situation. But if you don't have the marketplace to have that possibility for trading value, you will then never be in a position to, in effect, officially economically allocate these values.

Mr. OXLEY. Let me ask you this, then, if we all believe in a free market. If I were a shareholder in Marathon and I felt that the Yates Field was undervalued or that the management was not effectively dealing with that problem, why wouldn't I just sell my Marathon stock and buy stock in some other company that I felt would be more aggressive or that would be better managed, or, indeed, get the value of that particular asset to where it belonged. Or, why wouldn't I, as a shareholder, bring an action against the management under a shareholder's derivative action to make the changes in management or the board that would bring that about? Isn't that, indeed, the way that we work in a corporate democracy in this country?

Mr. GREENHILL. Yes. The question is—and that's the way shareholders—just sell shares. What that doesn't do is something has to be done where the average shareholder has no way to deal with change in management. And when Mobil——

Mr. OXLEY. Maybe we ought to be thinking about changing the way that we structure corporations, perhaps, and make them more democratic, instead of talking about an either/or situation that you seem to imply.

Mr. GREENHILL. Well, one of the reasons the SEC's advisory panel suggested these advisory votes was exactly what you're getting to. Every year your constituency changes as your shareholders change. You get different shareholders every year. We saw a series of very restrictive provisions being put into place which obviously entrenched management. And shareholders had no way of ever getting out of that. And that is why this Advisory Committee suggested those votes; but it only applies for the short term. We do not expect to have State law; we don't think that is practical.

Mr. OXLEY. Isn't that the equivalent, if you compare that situation of the advisory votes, to Mr. Wirth and I having a plebicite on every issue that we would vote on here in the Congress? In other words, if we're going to vote on the MX next week, we ask all the people in our district to vote one way or the other and then we respond accordingly?

Indeed, if that were the case, there is not much point in having Mr. Wirth and I here. We might as well have a couple of backups; we can go out and do whatever we want. But it seems to me that the board, the management, and, indeed, the Members of Congress, are relatively well paid to make those decisions.

Mr. GREENHILL. I again agree with you on that. And that is why I wouldn't adopt Mr. Rohatyn's decision. I think the advisory votes would come every year, every 2 years; it's a different matter. I think at some point the buck has got to stop somewhere. You all face it in Congress, you get reelected every couple of years and then the people expect you to do your job, they don't expect you to keep in touch with them. And in some companies management

really is not keeping in touch with the changing shareholders. That is exactly the proposal.

The other point on these votes is, nobody votes on a company's capital expenditures. And, frankly, if you're talking about a cash acquisition, in many cases there's very little difference with building a new giant steel mill or buying an existing business for cash. At a certain point you've got to say: "I've got the directors, I've got the best ones I can get. They're going to have to make some decisions."

Mr. KLEIN. Mr. Oxley, may I just make a point?

It strikes me that you're using the Findlay, OH, example as a good one. But good although it may be the problem that you are addressing, is not, I think, a problem of tender offers, or, for that matter, securities law. The interests that you are concerned with, which is in the employment levels in Findlay, OH, the pride of the community in having the corporate headquarters there, are interest that are really adjectival to the Federal securities law. And if someone else could own Marathon, and everyone could still have their job, and the Yates Field could still be run the way it was, and your widow would have made a profit on her stock and could redeploy that, the interests there, which are substantial interests, are about as related to the Federal securities laws as, I guess, Al Capone's conviction for income-tax evasion was related to his conduct. Tender offers are neither the source of all evil nor is tender-offer regulation the cure of all harm.

Mr. OXLEY. That is a good point. And although all of the things that you mentioned actually happened, and the cause was probably due more to lack of foresight or just being in the right place at the right time than anything else, or a more reasonable decision on the antitrust question by the Federal court in Cleveland—all of those were factors. And, of course, the great job that the chairman and I did on pulling things together at the Federal level—but what you say is definitely correct, and I appreciate your comments. [Laughter]

Mr. Klein, while you are answering I would like to ask you a question as to how you would apply the term "fraud" as defined in section 14-E of the Williams Act, so that the courts can employ it to examine the use and abuse of the defensive tactics. Do you have any thoughts as to how we can best do that?

Mr. KLEIN. I guess the quick answer is that how I would do it matters a lot less than how the Supreme Court has done it, and how a few of the circuits courts have done it. As you know, from the Mobil-Marathon litigation, you had a court there that attempted to reach out and divine some substantive law guidance from the concept of fraud in section 14(e). That decision has not been followed in any of the subsequent decisions. You've had some other concepts coming out of the Second Circuit in New York where there's been an effort to test the legitimacy of particular kinds of tactics by whether they keep open or close down an auction market. I frankly think that there would have to be more than some language in a report to change, the judicial attitudes which now are 5 or 10 years old, that the concept of fraud, even in the 14(e) standpoint, is restricted to disclosure and probably cannot be extended to substantive regulations. Therefore, if there is an intent