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Securities and Exchange Commission

FILE No. 4-175

In the Matter of .....

BENEFICIAL OWNERSHIP, TAKEOVER
AND ACQUISITIONS BY FOREIGN AND
DOMESTIC PERSONS

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P R O C E E D I N G S

HEARING OFFICER LEVENSON: The public investigatory proceeding in the matter of Bendix ownership, takeovers and acquisitions by foreign and domestic persons will come to order and be resumed at 10:05 a.m., November 14, 1974.

Counsel for the Division, Mr. Myers, will you call your first witness.

MR. MYERS: Thank you, Mr. Levenson.

Martin Lipton will be our first witness today.

Mr. Lipton.

STATEMENT OF MARTIN LIPTON

MR. LIPTON: First I would like to start with a disclaimer. I am appearing this morning as an individual, and these are my own ideas and don't reflect the ideas of my firm.

I guess the first point is that based on my experience, as a matter of legislative and administrative policy, tender offers should not be discouraged; that the experience since 1968 with the enactment of the Williams Bill indicates that the Congressional policy expressed then that regulation of tender offers should tread that narrow line of not favoring management or the offerer, is a good policy and that policy basically should be continued.

I think that has proved to be particularly true in the present market situation, where tender offers essentially provide the only liquidity that there is in the market for

major institutional investors where major institutional investors are not buying stocks.

Tender offers also are the only practical way that has evolved for changing control. Proxy contests never really have achieved the numerical standing that tender offers have and have never really been a practical way of changing control of a company, and thereby assuring efficient management.

Essentially what we are talking about is if the management of a corporation is not doing a good job, the company is under valued at the market or the assets of that company are not being profitably employed, the company becomes vulnerable to takeover by tender offer.

It also becomes vulnerable to takeover by proxy contests, but essentially, and I think the history of the last 20 years has proved this out, despite down market periods and despite poor management, the proxy fight has not been extensively used.

Most businessmen think that it is not really a good tool to acquire someone in an other than negotiated fashion, whereas it is quite obvious from the current popularity of cash tender offers that this is a means of acquisition of control of other companies that is acceptable.

One of the reactions of management to the cash tender offer has been the adoption of corporate devices, such as the classification of boards of directors and the

three or four categories with one class being elected each year, so that directors are elected for a three or four year term.

Some companies have combined that with cumulative voting so as to make it even more difficult to change the composition of the board of directors and some companies have combined that with requirements for super majority in order to effect a merger or other acquisition type of transaction, all of which devices are designed to make it difficult to do a second step after a cash tender offer.

It doesn't preclude a company from offering to acquire control of the company that has adopted these protective devices, but they are intended as a deterrent to the offer or then achieving actual control by nomination of the board of directors, or taking a second corporate step in merging or liquidating the acquired company into the acquiring company.

This, of course, is a legislative matter but I think it would be worth consideration as to whether Federal pre-emption of state corporation laws is appropriate in this area, because quite clearly these devices have to some extent deterred cash tender offers and have affected the ability of companies to make tender offers and the availability to stockholders of companies of the benefit of cash tender offers.

Another area of difficulty for the prospective

offerer is the inability in the time frame of a tender offer to obtain a list of stockholders.

The proxy regulations presently provide for mandatory mailing by the company to the shareholders of the opposition proxy material. There is no provision that requires a company to communicate a tender offer to its shareholders, and I believe that companies should be required to make stockholder lists available to prospective offerers and not use mail. Tender offfer situation is somewhat different than the proxy solicitation. In a proxy solicitation situation you usually have the time to go to a state court and obtain the shareholder list under the applicable state corporate law.

Tender offer situation is in a very narrow time frame and it is not as a practical matter possible to go to court, obtain the stockholder list whthin the period of the tender offer. The list is a very important adjunct to a cash tener offer. It is used by soliciting dealers to contact shareholders to request that they tender their shares.

I think that it would be appropriate that companies be required to make shareholder lists available to anyone who bona fidely contends to make a tender offer to the shareholder of that company.

HEARING OFFICER LEVENSON: Excuse me, Mr. Lipton. Under the proxy rules, you recognize the issuer has the alternative of either furnishing a list or mialing the proposed liter-

ature to the shareholders. I would appreciate it if you would comment further in terms of your suggestion that under the tender offer rules, the bidder should be able to obtain a list rather than the procedure followed under the proxy rules, giving the target company the alternative of furnishing a list or mailing.

MR. LIPTON: Right.

As I mentioned, Mr. Levenson, the time frame of a proxy contest generally permits the opposition to go to court and obtain the stockholder list. I don't think anyone considers the company mailing of opposition material sufficient for a properly conducted proxy contest, and in fact, I think it would be well that the proxy rules be amended so as to provide for the mandatory furnishing of a list in the proxy contest ad well as in a tender offer situation.

It gives management quite an advantage to have the list and be able to contact personally the shareholders while the opposition in the proxy situation or the offerer in a tender situation is not able to communicate directly, orally with the shareholders. The necessity for Federal regulation in the tender offer area is that as a practical matter, the time frame precludes resort to the state courts in order to obtain the list, while in the proxy contest, that makes it inconvenient, but in fact, as a practical matter, it usually is obtained and most states, courts of most states have held that the desire

to conduct a proxy contest is a proper purpose on which to base a request for a stockholder list and generally grant the list to people who want to conduct a proxy contest.

The next major area that I feel requires attention is disclosure. As the notice for these hearings indicate the Commission is concerned with disclosure in tender offer documents.

I think it is very important that the Commission recognize that disclosure regulation can have a very substantial deterrent effect on tender offers. I think the Commission should recognize that it isn't just the current economic situation of low multiples, low prices in relationship to values of stock, but in fact that the tender offer, cash tender offer is one of the very few means of acquisition that does not involve long processing with the Commission, and that pre-clearance of tender offer material would probably have, I won't say substantial -- I am not sure -- but it would probably have a deterrent effect on the use of cash tender offers for acquisition purposes.

HEARING OFFICER LEVENSON: In what respect, Mr. Lipton?

For example, assume you had a ten-day or five-day pre-filing requirement of the proposed material. In what way would that deter a tender offer?

Let's assume again that the pre- filing material

would be treated like preliminary proxy materal, non-public. In what way would that have a deterrent effect upon tender offers?

Indee, it may well be that processing could avoid extensive litigation that many times results as a result of defective disclosure.

MR. LIPTON: I don't know that there has been very much defective disclosure. There have been, of course, a series of cases in the Southern District of New York in the Second Circuit which in my opinion have perverted the Williams Act into a shield for management and which I think is recognized as such by the Second Circuit. The Second Circuit has changed the approach toward the dislcosure problems in tender offers. For a period during 1972 and 1973, any omission from tender offer of a possible problem with respect to a takeover was considered by the courts in the Second Circuit to warrant a preliminary injunction against the tender offer as such.

The Courts have now switched to enjoining the continuance of the offer until the, whenever it is, disclosure is made, which I think is a substantial improvement in the Court's approach to the disclosure requirements of the Williams Act.

I think you have to recognize that as a practical matter many businessmen are deterred from undertaking a trans-

action where it is going to get into a situation of negotiating or processing disclosure documents or running the risk of premature disclosure of what the plans are. A tender offer is a very sensitive thing in relationship to market price, leaks of important material, information, et cetera, and I think that the present procedure of permitting companies to go forward and announce their tender offer and file simultaneously with the Commission, subject always to the Commission's authority to review the material and seek changes in the material, supplementation of targets or shareholders' right to litigate the question of appropriate disclosure is indeed a workable system and one that should not be changed.

I think that the deterrent effect of the Commission's coming into court and seeking to enjoin or have the tender offer changed or supplemented is sufficient to assure full disclosure in the cash tender offer area.

I recognize that this is a policy judgment and a value judgment. Based on my experience I think that it would be well to continue the current methodology.

One other sort of miscellaneous point, and then I will turn to the main areas that I want to talk about, and that is, I think, it would be well for everyone if the ten-day period for the filing of a 13D statement after someone acquires five percent or more of the stock of a company is reduced from ten days to two or three days. I think the earlier notice

period would be beneficial to the market as such, the shareholders and the company involved. There is no real reason to have any longer period than two or three days. I note that in the English company bill, introduced December 18, 1973, but not enacted, the proposal, the legislation provided for the reduction of the notice period to three days and for the reasons I have indicated.

The next area that I would like to talk about is the difference between cash tender offers for one hundred percent of the stock of a company and cash tender offers for less than 100 percent of the stock of the company.

I believe that there is a major substantive and major disclosure difference between offers for a hundred percent of the stock of the company and offers for less than 100 percent of the stock of the company.

In the hundred percent offer situation, you present a very queer choice to the shareholders. They either stay or they sell. They are sure that they can sell all of their holdings; if the shareholder has a hundred shares he knows if he tenders he is going to sell his entire hundred shares.

He is not going to be left with 50 of the 100 or 40 of the 100 or whatever it is when there is an offer for less than 100 percent of the stock.

I think in the 100 percent offer situation, it is

much less important that there be extensive disclosure with respect to the offerer. The only real question faced by the shareholder is whether he is better off tendering his shares and accepting the tender offer price or whether the offerer has in mind a second step which would be even more advantageous to the shareholder.

What I have in mind is liquidation of the company at a value that the offerer believes to be in excess of the tender offer price, a merger or some other corporate kind of transaction that would provide in the relatively near future a larger consideration to the shareholder than the acceptance of the cash tender offer price.

I particularly have in mind in the 100 percent offer situation that it is not that significant that extensive financial statements with respect to the offerer, albeit a private company, be part of the other document, and specific reference to the Greco case.

The less than 100 percent offer, where there is no question but some of the shareholders will continue to be shareholders of the company, or depending on the amount of shares tendered, that all of the shareholders of the company will continue to be shareholders of the company to some extent, presents a much more cogent situation for information about the offerer and more extensive information with respect to the offerer's plans and intentions with respect to the future

operations of the target company.

It is interesting to note that the English company's bill that I referred to previously provide that where a company attained 90 percent of the shares, where an offerer obtained 90 percent of the shares, there were reciprocal freeze-out rights.

Any shareholder could then require the offerer company to buy his shares at the offered price and the offerer company could require the shareholders of the target company to sell their shares at that price.

Again, the bill was not enacted, but the city code, the city panel on takeovers and mergers in London contains three provisions protective of the rights of the minority in less than 100 percent tender offer situations. Rule 35 provides that if the offerer acquires 40 percent or more, then it must make an offer to acquire the balance at the highest price paid during the previous 12 months.

Rule 33 provides that if an offerer acquires 15 percent or more in any 12-month period, then he must make an offer for the balance of the shares and General Principle Nine is somewhat comparable to our Rule 10-B-13 but it goes a bit further. It provides that if in contemplation of the takeover bid an offerer acquires from anyone shares of the target company, then all other purchases must be on a basis no less favorable than that purchase.

I think most institutional and professional investors feel that it is a major adverse circumstance if someone acquires 20 percent or more of the outstanding shares of a company in which they have a substantial investment, but most professional and institutional investors would prefer that A over B made for 100 percent of the stock of the company or that the company be a truly public company, with no doctrinating interest at 20 percent or more.

In this connection, the accounting principle that permits equity, the equity method of consolidation, one line consolidation for 20 percent or more ownership, I think is an important consideration and the combination of purchase accounting with the equity method has made quite desirable the ownership of 20 percent or more of the stock of another company, and if that proliferates, it will create serious liquidity problems with respect to the shares of such companies and probably to the disadvantage of the already shareholders of those companies.

The income area that I would like to talk about is a favorite of mine and one that I have written about, and that is openmamarket purchases to defeat an tender offer.

I would like to pose it in the terms of hypothetical situations. The target company is listed on the New York Stock Exchange. It has two million shares outstanding and the market price is $20 a share. Offerer, either in a friendly or a hostile situation, it doesn't matter for this purpose, decides to

make an offer at $26 a share or 30 percent premium, a fairly customary premium for a cash tender offer, and the offer is for all of the outstanding stock but it is conditioned on obtaining at least 50 percent of the stock, a million shares.

Again, a very customary kind of tender offer. The offeror wants to be assured of absolute control and, therefore, the condition of one million shares and is willing to accept all of the shares of the company at $26 a share. We can assume that the soliciting dealer fee is 50 cents a share, so that the dealers who solicit tenders will be paid 50 cents.

When the offer is announced, the New York Stock Exchange price goes to 25 and a quarter or better. That, too, is customary. They start to buy the stock with a view towards vending it. They know they will get $26 and if the solicitors fee is unlimited they will get $26.50 so it pays an arbitrageur to buy the stock if he is fairly sure the acceptance of the tender offer at prices up to $26 and a quarter. Usually the stock will sell within $1.50, the tender offer plus the soliciting dealer fee if it is not limited.

At that point, within a day or two after the offer becomes effective, generally you will find that about 20 percent or so of the outstanding stock is sold on the Stock Exchange and almost solely to professional arbitrageurs.

In a typical situation 20 percent of the stock of a company that is not a special institutional favorite will

also be held by institutional or other professional investors so that within two or three days after the offer has been announced, approximately 40 percent of the stock of a typical company will be held by either institutional investors or the arbitrageurs would have bought the stock as on the board of the Exchange as a result of the tender offer.

At this point, two or three days after the effectiveness of the tender offer, a competitor shows up and decides that the target company would be a good acquisition competitor rather than offeror and he would like to take this deal away from offeror but he doesn't want to pay anything substantially more than $26 a share for the stock, in a typical situation, if it was the top of the bid, the increased tender offer bid by competitor would be two or three dollars more.

Competitor finds or concludes that there is a better way in which to take this opportunity away from offeror and keep it from the competitor and that is to buy control of the company right on the floor of the New York Stock Exchange. It sees from the trading that is taking place in the first two or three days, and the manuals would show the institutional ownership of the stock, that 40 percent of the stock is in the hands of people who will be immediately responsive to whatever the bid price is on the floor of the Stock Exchange, and if we assume that the stock has moved right up close to the 26 and a quarter, 26 and three-eighths, theoretical limitation,

with the $26 offer price and 50 cents solicitor dealer fee, they know that bidding 26 and a half on the floor of the Stock Exchange should bring in all of the stock that is in professional hands, 40 percent of the stock that is held by arbitrageurs and professionals, and if you go to the post and continue to bid at that price, you are probably going to get that stock from the professionals, unless they believe that it is a prelude to still a higher offer.

Most professionals are fairly content to take the price right then and there and most arbitrageurs who work on the basis of the annual return on their invested funds are happy to take their one dollar, one dollar and a quarter profit right then and there without waiting around to see what happens, so that the stock will come in fairly readily from the institutions and the arbitrageurs.

The activity of the competitor is fairly well covered. It is not that easy to find out what is going on initially, because the normal arbitrage activity covers the enhanced volume of trading in the target company stock, but as the competitor proceeds to purchase it before the Exchange on days three and four or four and five, the volume does appear to be unusual and either the stock exchange or the Commission makes inquiry as to what is going on, and as a result of the inquiry, the competitor is forced to announce that it has made large purchases on the floor of the Stock Exchange.

It now owns 800,000 shares. It intends to buy another 200,000 shares in order to obtain control of the company for itself rather than offerer getting control.

At that point, with the public disclosure and announcement, there is a great opportunity for the short sellers and the professionals of the market. They are well aware of the fact that if the competitor obtains its announced 50 percent ownership, that will preclude offerer from going through with the tender offer, because certainly it is conditioned on getting at least 50 percent and it certainly isn't going to buy whatever is tendered to it and then end up in minority position as against competitor. So, the professional is safe in assuming that offerer's offer is dead and it will not be consummated. He knows the competitor is seeking only another 200,000 shares, so that there will be another million shares inloose hands following the satisfaction of competitors bidding program, so it presents a beautiful opportunity for short selling. It is safe to assume that at that point, you can borrow stock, sell it short on the floor of the Exchange. This is not applicable if this is not a tender offer and the professionals can sell short into the 200,000 shares buying program, with rather complete confidence that as soon as competitor's buying the program is terminated the price of the stock will fall back substantially below the 26 and probably even below the previous $20 market price, so

that the advantage at this point belong to the professionals and those stockholders who are contacted by their brokers immediately and told you had better sell your stock right away, because as soon as these fellows fill their requirement of another 200,000 shares, the buying will disappear and the price will fall.

The offerer is in the position of being unable to compete on the floor of the Stock Exchange because of Rule 10-B-13, some of the offerer has available to itself a few one way of competing with that buying program, and that is to amend its tender offer and announce a higher price, but even that may not be very effective if a very substantial block of the stock has been purchased before disclosure is made and the offerer knows what is happening.

In practical effect, the open market purchases in competition with a formal tender offer results in competitor avoiding the seven-day withdrawal requirement of Section 14-D of the '34 Act of the Williams bill. The proration requirements have been avoided. Shareholders do not have the benefit of the ten-day proration requirement, and even more importantly, the shareholders and the public do not have the benefit of the disclosure requirements of the Williams Act.

Initially they don't know who they are selling to, they don't know what the purpose is, they don't know what the plans are and they don't know who the buyer is, and the public

in effect has none of the protections and advantages of the Williams Act that Congress sought to bestow on them, and the competitor has been able to use the shield of Rule 10-B, 10-B-13 and the Williams Act to defeat an otherwise lawful and appropriate offer.

I think it is an area that is covered by the Williams bill. I think such opening market purchases in competition with the tender offer are in fact a tender offer and require Williams Act compliance.

I know of one case in actuality, and perhaps there have been others. It is an area that I think is capable of solution by the Commission's exercise of its regulatory enforcement powers.

Another and somewhat related area, and one that has been termed the "creeping" tender offer problem. Essentially the back pattern is open market or other purchases of stock in advance of a formal tender offer. Now, there are, I think, four or five reasons why offerers find it desirable to buy shares in the open market prior to making a formal offer. One is to develop leverage with respect to the target company.

Frequently, the offerer desires an acquisition transaction, usually cash acquisition. It expects opposition, but feels that if it owns three or four percent of the stock of the company, or maybe even more, and it is the largest stockholder, management will be less likely to oppose or

reject negotiations for a friendly offer.

That is one reason why a prospective offerer might find it desirable to purchase shares in advance of a formal offer.

Another reason is to test the market to determine at what price it appears that major amountsof the stock will be offered for sale. In other words, in fixing a tender offer price, the offerer wants to be successful and feels that pre-offer purchases in the open market may enable it to determine at what prices large amounts of stock would be offered for sale.

A third reason is uncertain on the part of the offerer as to whether it really wants to go forward, and by control of the company.

The offerer in that situation seems to like the idea of owning control of the target company, but in effect is getting its feet wet and will sit back and look at it a little bit more and finally make a decision.

A fourth reason is to acquire a portion of the ultimate position at a lower price. The offerer feels that by buying in the open market at prices which do not reflect the premium, that it is ultimately going to offer in the formal offer, its average cost for the total ultimate position will be less than if it announced the offer without any pre-offer purchases at the premium price.

I guess a fifth reason is to build a position on which to make a profit in case the offer is topped by a competing bidder.

I guess that more or less exhausts the reasons for pre-offer purchases.

The problem of pre-offer purchases raises a question of the interrelationship, the disclosure requirements of Rule 10-B-5 with the disclosure and integration questions under Sections 14-D and 14-E. I guess the first question is whether Rule 10-B-5 will be found by the courts or asserted by the Commission to require the disclosure of market information, an issue that the Commission has pending before it in connection with its requests for comments on the disclosure requirements of rule 10-B-5.

I think the key point here is that as you get disclosure of the pre-offer purchases, if you require disclosure of the pre-offer purchases you build a much stronger case for the integration of those purchases with the later tender offer. In fact, I would say that once you make the announcement, you are in the tender offer, so it is only if you can make pre-offer purchases without disclosure that you even have the pre-tender offer issue. A disclosure is made.

I think that at that point you have got a tender offer. There is no question about it.

All the courts that have considered the issue of the pre-offer, pre-disclosure purchases have held that the offerer can at least go to the five percent threshhold point and that those purchases will not be integrated with the later tender offer. Probably the most extensive discussion and the clearest discussion is in the Texas Gulf, Canadian Development Corporation case.

None of the cases, except the Texas Gulf case, where specific reference is not made to Rule 10-B-5, but specific reference to disclosure is made, considered the question of the disclosure of the market information under Rule 10-B-5, that a person intends to make large purchases in the open market of the company's stock.

To my knowledge, no case has passed on this pure issue of whether the intention to effect large transactions in the market requires disclosure under Rule 10-B. Aranow and Einhorn in their book on Cash Tender Offers and Messrs. Fleischer, Mundheim and Murphy in a leading article in the Pennsylvania Law Review have rejected the concept that both the 10-B-5 disclosure concept and the integration concept, and have taken the position that Rule 10-B-5 does not require such disclosures and those pre-announcement purchases do not require integration for Rule 14-3 purposes, and in a Book Review of the book that I wrote, I raised a question with respect to that and indicate my opinion that ultimately,

10-B-5 is going to be expanded to require disclosure of material marketed in connection with this type and that will result in automatic integration for 14-B purposes.

HEARING OFFICER LEVENSON: Excuse me, Mr. Lipton.

Let's assume these open market purchases and let's further assume that the company acquiring the securities in the open market does make a public announcement through a press release of such open market purchases.

Let's further assume that the acquiring company does not have a plan at that point in time to make a subsequent tender offer, but is considering it among other proposals and is an alternative among its intentions. Based upon those assumptions, would you conclude that the mere announcement by that acquiring company of the open market purchases would cause the Williams bill tender offer requirements to be triggered?

MR. LIPTON: I could make a theoretical case for saying that that complies with whatever disclosure requirements are applicable under Rule 10-B-5 and since in fact the company has not made up its mind as to whether it is going to make a tender offer, it should not be integrated for 14-B purposes, but I think that when you think through the impact that kind of announcement would have on the market, the advantages and disadvantages to the unsophisticated shareholders, it would be preferable that if a company wants to make a tender offer, go

ahead and make it, as required by the Williams Act, and that there be some sort of objective standard. Maybe what we require is a waiting period. That is perfectly okay to do that but if you are going to do that then you can't follow through with a tender offer right away, that there comes a point where it is probably better for everybody, the Commission as an enforcement matter, for offerers as a matter of certainty and the public to know when that sort of thing happens it is going to be at least 60 days, 90 days, 12 months, whatever period is selected as a matter of policy before that second step is going to take place. I find great difficulty in amorphous intention areas and I think people who advise offerers or target companies, et cetera, are left the uncertainty as to the difficulty that you are going to have with just such assertions as to intention.

It is a situation that really requires some degree of certainty. There is a lot at stake in these cases, and it would be better that there be a more objective standard for making that determination.

HEARING OFFICER LEVENSON: Just to follow this through, let's assume one did have a waiting period of whatever quantified time would be involved, whether it be 60 days or six months. What would trigger that?

We talked about open market purchases, but would any quantity of securities upon the open market trigger that

plus the intention or would a specific percentage acquisition.

MR. LIPTON: I suggest a specific percentage. I don't know whether the 2 percent that is used in the Williams Act today is an appropriate percentage or not, but it is one that I think is a reasonable percentage to use as a trigger point. Whatever number is selected is in effect is an arbitrary decision and I don't think that one can build a great logical case for any specific number, whether it be one percent, two percent or five percent.

I think it should be a relatively low percentage, because two percent is there right now, that seems to be an appropriate level at which to make this choice.

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MR. MYERS: I would like to follow up one point you raised. You expressed concern with using any measure of intent as to determining when the tender offer begins. Within the area or the situation where one goes into the market to acquire shares, where a third party has already announced a tender offer isn't it the intent of that person making those purchases the determining factor in viewing that activity, or as a tender offer?

MR. LIPTON: Yes. I think the two situations are quite different. I think where the open market purchases are made to defeat an offer, the intent is very clear. It is the busines man's dilemma in the normal situation where he is acquiring a position in a company. He really doesn't know whether he wants to make a tender offer or not. That gives me the greatest problem with respect to intention. Many times you come across situations where someone has acquired four or five or six percent of the stock, either before the threshold point or after the threshold point and you are trying to determine as a lawyer what his intention is in order to file a profer, Schedule 13-B. You are faced with the answer I really don't know what I want to do. If the money is like this, the prime rate goes down, these other factors, then I think I would like to make a tender offer if their fourth quarter earnings are at the level their third quarter earnings indicated they would be, et cetera. Those aree very, very difficult problems of compliance. Someone

who wants to comply wants to avoid any question, has nothing to hide or not disclose but it is rather difficult to draw those lines and properly express the kind of amorphous intention that is frequently the case when somebody is building a position. That is much different than the competition to take somebody else's offer away, or someone who has made up his mind to make a tender offer and is building a position for one reason or another in advance of making the tender offer essentially to get the stock at a lower price.

[illegible] then [illegible] a tender offer. Do you think there should be disclosure by one who is in the market with the intent to announce a tender offer at some future date.

MR. LIPTON: My feeling goes beyond that. If you really intend to make a tender offer I don't think you should make open market purchases. I think those purchases are and should be integrated with 14-D purposes and that in fact the first purchase is in violation of 14-D filing not because you haven't complied with the filing, the disclosure requirements, et cetera, and obviously you are not in position to comply with the integration and withdrawal provisions, so if in fact you have the intention to make a tender offer there is no issue at all and you don't have a 10-B-5 disclosure problem as you have with the exact compliance problem. It is those situations where that intent is in actuality not formulated at the time of the purchases that creats the difficult disclosure problems and

the interpretive problems.

HEARING OFFICER LEVENSON: Mr. Lipton, before you continue, just one point, getting back to the 10-B-5 and then the 14-D, 14-E integration. With respect to the application of 10-B-5, or the possible application and the evolving of development in the field of 10-B-5 causing disclosure of this type of market information, at what point would be triggered?

MR. LIPTON: I don't know the answer to that. My own reaction to it is that market information that is material has to be disclosed. Materiality is a factual question. I guess if you are going to buy 10,000 shares of a thinly traded stock, and it is selling at 20 and you are willing to pay up to 30 and you feel that putting that order in is going to drive the stock from 20 to 30, maybe you have a disclosure problem to those fellows who sell at 20 who could have held out for 30. If you are going to buy 10,000 shares of AT&T and it may not move the stock at eight, that is not very material. It has to be judged in relationship to what a reasonable person could expect the market impact to be. I don't think there is much of a problem. You know in any specific situation what your intention is and you have a pretty good idea of what the impact on the market is going to be.

HEARING OFFICER LEVENSON: Wouldn't the impact be greater if there was a public announcement than if there was not a public announcement? In other words, would the public

announcement cause the impact as distinguished from the acquisition plan?

MR. LIPTON: I don't know about that. That has not been the experience with respect to the announcement of corporate re-purchases. You have gotten to the point where they are buried in the Wall Street Journal and not very many people pay much attention to them. You used to get sort of prominent news treatment. Then you get enough of them so that they don't seem to have any real substantial impact on the market price of the stck of the companies that announced that they intended to buy from time to time up to a hundred thousand or a million shares of their own stock. The Commission of course has proposed Rule 13-B-2 before it for consideration, and with respect to re-purchases, that may provide guidelines. It may be that in connection with the purchases of material amounts of stock, while I don't think 13-B-2 as presently proposed would be appropriate, there are similar kinds of objective tests that might be applied to determine the manner of purchase and the degree of disclosure that is necessary with respect thereto. I think market information as such is a new area of concern. I think it is probably much more a concern of high multiple, highly volatile, high volume markets than it is of the kind of stock market that is being experienced today, but it has always seemed to me that market information had a much greater impact on shareholders than corporate information,

that except for those very unusual kinds of corporate information, pending bankruptcy or liquidity problems or major mineral find or something like that, the normal kind of material corporate information does not have the kind of market impact that the tender offer at a 30, 40, 50 percent premium has and that is much, it has, market information has a much greater impact on the unsophisticated public investor than the professional.

MR. MYERS: This question of market information raises one additional question in my mind and that gets back to the disclosure of the intent to make a tender offer. If the company has not firmly decided to make the tender offer, but is seriously considering the possibility, at what point should the insiders of the proposed offerer be prohibited from going to a market and purchasing stock of the proposed issue.

MR. LIPTON: That could be immediately, as soon as the company starts to consider the insiders should be prescribed.

MR. MYERS: Prior to the announced tender offer?

MR. LIPTON: I think the Commission has been successful in establishing that in the corporate areas, in the Shapiro Case, the Greco Case, and I see no distinction between those cases and the insiders of the offerer going into the market and using the information. There are those who draw the fiduciary duty distinction with respect to 10-B-5 and hold that it is only when it is inside of violating the trust to that

corporation that Rule 10-B-5 applies. I don't think so, and the Commission itself has brought a proceeding in the North American Phillips Magnavox Case, which are direct marketing case, the Magnavox Case being the exact situation.

Open market purchases that are not in advance of a formal offer also create a very difficult problem under the Williams Act.

Again, except for one case, those against Accident and Casualty Insurance Company, whish is a somewhat unique case in that the open market purchases were after disclosure of intention to buy 20 percent of the stock of the company and in competition with someone else's announced intention to make a tender offer, all of the cases have held that open market purchases are not a tender offer for Williams Act purposes.

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The most recent case is a decision by Judge Wyatt in the Southern District of New York, an investment case, the Nachman case and a few others have recognized the impact theory that first appeared in a note in the Harvard Law Review that at least Nachman recognizes, although the case itself rejected it, that an open market or privately negotiated block purchase of stock has an impact on shareholders of the type that is intended to be regulated by the Williams Act, and these types of purchases should be held to be tender offers and therefore subject to the Williams Act.

Except for the Lowe case, no court has so held, and it is an area of some considerable doubt and question at the moment. Someone sought to draw a distinction between ordinary open market purchases, block purchases, privately negotiated purchases, etc. The Commission itself in the American General Insurance no action letter, which was then overturned by the LSL Corporation, it was indicated that where a controlled stockholder seeks to increase its position by passive open market or block purchases, the Commission is not prepared to take a no action position with respect to whether or not this is a tender offer.

My feeling in this area is that when you have a major shareholder, whether it be a 10 percent, 20 percent

or 50 or 60 percent shareholder, that intends to increase its holding, I can see no policy reason for not requiring that to be done under the Williams Act. I think the position, the Commission's no action position in LSL is the right position, recognizing that the Commission is not affirmatively saying that they would consider it a tender offer if the company went ahead but there is no real good reason to permit someone in that position to acquire large amounts of stock without making a formal offer.

I think the only reason why one would want to do that without making a formal offer is to avoid the premium that is usually intended to a formal offer. As I mentioned before, I think some of the problems in this area can be solved by objective tests, the 30, 60, 90 or more days' waiting period, an exception for relatively small purchases, the 2 percent or the 5 percent test, also I suspect there ought to be an exemption, exception for a relatively small number of solicitations, whether it be ten by analogy to the proxy rules or some other limited number, and that the Commission should also in adopting new rules or making recommendations for new legislation, keep in mind the problem of a negotiated purchase of an essentially private company that has more than ten shareholders, so that if everybody is essentially getting the same price, normal Williams Act compliance

would not be necessary.

To my mind the key here is equality of price, that shareholders know what is going on, disclosure, equality of price. The other things, you are sure you know that everybody knows what is going on and has been afforded equal treatment, in the special situations, the withdrawal rights, proration rights, etc., either by definition, because there is equality of treatment, and by the nature of the transaction it becomes relatively unimportant.

The last area I would like to mention very briefly, I find in my experience that arbitrage is a very important function and very beneficial to the public unsophisticated shareholders in cash tender offer situations and that in arbitrage, the activity of the arbitrageurs provides that immediate liquidity at pretty close to the offer price for any shareholder who wants to realize at that point, and it passes the risk of proration from the shareholder body as a whole to the professional arbitrageurs who have the financial ability and stability to bear that risk.

I think that in any administrative or legislative proposals, the Commission should take into account possible impact on arbitrage in determining whether or not those proposals are appropriate.

That is basically what I have to say.

MR. MYERS: Thank you very much, Mr. Lipton.

We have a few questions that I would like to go into based on your oral presentation.

Getting to the problem of the open market purchase during a publicly announced tender offer, with the intent either to defeat the tender offer or to acquire control of the company itself, can any objective standards be developed in determining when one who is engaged in that purchase activity during that period should be subject to the Williams Act amendment?

MR. LIPTON: Yes, when he purchases the first share.

MR. MYERS: What type intent?

MR. LIPTON: To defeat it. If you start out that the purpose is to defeat the tender offer, then there ought to be Williams Act compliance with the purchase of the first share.

MR. MYERS: What about if intent to acquire a certain percentage of the shares or intent to influence management or to possibly obtain control, where the previously publicly announced tender offer was not for all of the shares?

MR. LIPTON: I don't think it makes any difference. I can see no reason at all if you have a

formal tender offer in process why anybody should be able to buy any shares without comparable Williams Act compliance. Certainly it is in the interest of the public, the market as such, the shareholders of the company and the company as such to know what is going on. It is in everybody's interest that the protections of the Williams Act be available.

In 14-D-4, requiring people supporting or opposing a tender offer to buy under the Williams Act, there is an indication to the fact. In my opinion 14-D-4 is applicable to such activity and I think the Commission has erred in not seeking to enforce Rule 14-D-4 in those situations.

MR. MYERS: You would not suggest any type of percentage test such as 14-G-1?

MR. LIPTON: No. I don't think even a low percentage test is in any way applicable to that situation. Where there is indeed a formal tender offer pending, any purchase or any activity should require Williams Act compliance.

MR. MYERS: That compliance would include some type of public announcement?

MR. LIPTON: It requires exact compliance, which is filing of either a Schedule 14-B-1, or 14-B-4 to make the kind of disclosure that is required by the

Williams Act. If nothing else, the public, the shareholders, the company, is entitled to the disclosure of the intention to do something in the market, and the information with respect to the background of the people who intend to defeat the tender offer.

It might well be that the target company would immediately go to the initial offerer and say, you are much more desirable for us than our shareholders than these highbinders who want to come in and take over the company in competition with them.

MR. MYERS: Assuming a 14-D-1 statement is filed, are the present seven-day withdrawal provisions adequate to provide shareholders sufficient time to withdraw their shares and tender them to the competitor tender offerer?

MR. LIPTON: Probably not; probably not, and probably a new seven-day period should run from the point where the competitor's filing is announced.

MR. MYERS: From your experience in this area, is the seven-day withdrawal period sufficient time for a shareholder to adequately digest the information he has received and decide whether he wants to withdraw his tendered shares?

MR. LIPTON: Well, I find the seven-day period to be meaningless in practice. The typical offer is either

ten days or fourteen days, and in large measure it depends on whether it is a friendly offer and the list is available or whether it is an unfriendly offer and the full form of newspaper solicitation is used.

Hardly any shares come in before the last two days. The public shares begin to come in during the last two or three days, just by virtue of the delays in mail, etc.

As far as the broker-solicited shares and the arbitrage shares and professional shares, they never come in until an hour before the expiration date of the offer. Everybody holds in anticipation of perhaps a higher offer or something else happening and nobody wants to be locked into a situation where his shares are on deposit and not subject to withdrawal for the balance of the 60-day period, whether it be 50 days at that point or 46 days at that point, so that as a practical matter, the only shares that come in immediately before the expiration of the offer are those that come through the normal mail solicitation and those are relatively a very small percentage of shares.

MR. MYERS: Would it be of any additional benefit to shareholders to have the seven-day withdrawal period extended?

MR. LIPTON: I don't think it is very

meaningful. I don't think it would provide any additional benefit. I don't think it is meaningful one way or the other.

MR. MYERS: Along those same lines, would a minimum period of time during which the tender offer must remain open be of benefit to shareholders in that it would give them additional time to digest the information they received and possibly make a decision under less pressure than which now exists?

MR. LIPTON: I have some doubt about it. I think that a tender of 14-day period is sufficiently, really. I think there are advantages to the immediacy and the certainty of the cash tender offer that if the period was to be extended to three weeks or four weeks, etc., would have an adverse effect on the desirability of the cash tender offer as a device for acquisition.

I think that as a matter of logic or of policy it is impossible to say that, you know, 14 days or 10 days is the appropriate period; whether it be 10 days or 14 days is not that meaningful, but I think if there was to be any extension beyond the tender of 14-day period it would have an adverse effect on the desirability of the cash tender offer as an acquisition device.

MR. MYERS: Is that because it would give

management additional time to defend against the tender offer?

MR. LIPTON: It is not so much that it gives management time to defend or someone else time to come in as businessmen don't like to be in an uncertain position when they have a great deal of money at stake for a very long period of time, and these offers will be commitments of anywhere from 10 million to several hundred millions of dollars.

We have got all sorts of business and financing considerations to take into account. People don't like to be open for very long periods of time when they have a great deal of money at stake.

MR. MYERS: One suggestion broached is the objective test which would involve limiting any purchases in any open market purchases during a certain period of time prior to the public announcement of the tender offer.

Would this just move market activity to a time prior to the commencement of that period and to what extent would shareholders be benefiting from a period of 30 or 90 days during which no market activity could occur?

MR. LIPTON: I don't think it would affect either of the circumstances you raised. I think that the advantage of an objective period would be to tell offerers,

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that they are not going to get in trouble if they go forward with their offer at a particular point. Obviously, the shareholder is not, well, it depends on what happens in the market as to whether the shareholder is benefited or disadvantaged by the waiting period, but the only situation that I can envisage as perhaps being ill served by the presumptive waiting period would be if the policy decision was made that it is not a good idea to permit companies to establish a position before making a tender offer for the purpose of having a position at a lower price, or either averaging purposes or if they are topped by somebody else, at least they will get their expenses back from the profit they make on the shares.

If that policy decision were to be made you are facilitating that activity by providing the presumptive waiting period, but I am not at all sure that either of those policy determinations are appropriate, and accordingly, see no real disadvantage to the public shareholder in providing for the certainty that would result from the offerer knowing that it is not going to have an integration problem if it has not made any purchases within whatever this period of time is.

MR. MYERS: Is it the consensus of the businessmen who contemplate tender offers that it is necessary or extremely helpful in having a successful

tender offer that open market purchases be made prior to the commencement of the tender offer?

MR. LIPTON: No, I don't think so, but I think that one or two of the reasons that I mentioned before are considered important. Most businessmen want to make friendly offers, not unfriendly offers, and I think they assume that if they acquire a 2 or 3 or 4 percent position in a company, it will give them the leverage with management of that company to at least open discussions as to the possibility of a friendly tender offer, rather than a hostile tender offer.

I think also that many businessmen are in truth, in fact, getting their feet wet and not building a position, averaging their price or taking the position that they have to make a profit. In fact they are indecisive with respect to whether they want to do it or not. This is a buildup to the ultimate decision as to whether in fact they will make a tender, both of which I find from a policy standpoint to be not undesirable.

MR. MYERS: Getting back to the problem of market impact on purchases, the approach taken by some state jurisdictions is to exempt transactions, if neither the principal nor the broker solicits or arranges for solicitation in order to sell.

Is that a feasible approach, even if there is an intent by that purchaser to make a tender offer sometime in the near future?

MR. LIPTON: I have always had a great deal of difficulty with the concept of solicitation, and word gets around pretty quickly that somebody is in the market and whether he sends out a letter or publishes an ad or makes two telephone calls or just lets one broker know that he is prepared to buy, word gets around, and the sophisticated have the advantage of it and the unsophisticated do not, and if somebody intends to acquire a position that from a policy standpoint should be done through Williams Act compliance, then the Williams Act ought to apply.

I don't see a distinction really between open market purchases, block purchases, privately negotiated transactions, etc. I think I am personally a devotee of the impact theory, and if the activity, whatever it be, is going to result in the effects that the Williams Act is intended to regulate, then the Williams Act ought to apply and I see no reason why the offer should not be made in regular Williams Act compliance terms.

I find it very difficult to come up with justifications for major purchase programs, now talking about 5 percent and more in any manner other than through

Williams Act compliance. I don't see any reason for it.

HEARING OFFICER LEVENSON: Mr. Lipton, just one question: you use the word intent, not only in this last colloquy but in prior testimony and I understand your testimony to be that if a company has a bona fide intent to make a tender offer, although not yet a, quote, plan, and at that point goes into the market and acquires securities in market transactions, that in itself constitutes a tender offer.

MR. LIPTON: That is correct. I don't draw a distinction between plan and intent. I guess some people have asserted such distinction. I find that not possible to draw in my own mind, and if somebody has intent, he has a plan, and if he has a plan he has the intent. I think it is a question of whether in fact he has either, not a distinction between the two.

MR. MYERS: The other side of the coin as to when a tender offer commences is when a tender offer terminates, and what I am thinking about, if the situation were one when a person makes a tender offer for less than all the shares of the company, the tender offer is completed, there is still trading activity in the stock: do you have any difficulty with that person's going into the market and purchasing additional shares at prevailing market prices?

MR. LIPTON: Yes, I do. I frankly think that that is the exact parallel of the situation I mentioned before of the major holder then going out and purchasing additional stock. That always gets around. People know that XYZ Company, which has just acquired 53 percent through a tender offer, is desirous of going to 80 percent, if that is what it is, and I think that the effect is exactly the same and I think that a program of purchases by such a company is a tender offer within the Williams Act.

The Williams Act will be so interpreted and I think the Commission indicated as such in the LSL letter, although in negative rather than affirmative way, but that is really no different a situation where you get a control stockholder wanting to continue to make purchases in the market, whether it be by block transactions or open market purchases.

I see no policy reason to permit that.

MR. MYERS: For purposes of the Williams Act, should those subsequent purchases be deemed to be part of the first tender offer or should that be the commencement of the new tender offer?

MR. LIPTON: I think it should be the commencement of a new tender offer. I think somebody should be able to legitimately say I have made a tender

offer, and I am not continuing that tender offer, and then at a future point, decide to make a different tender offer. I don't think that it is necessary to integrate the two tender offers. I think your integration problem comes up if you don't deem the second purchasing a tender offer and require Williams Act compaliance.

Of course you have a factual question as to what the intent really was if he terminates his tender offer on Monday and on Wednesday he announces a new tender offer at a different price, but if in fact they are separated, if the time span is very short, unless there is some -- I hesitate to use change of circumstances as a measuring tool here, but unless there is some real substantial change in circumstances, it would be very hard to believe that the new offer was not related to and should not be integrated with the first offer.

HEARING OFFICER LEVENSON: Mr. Lipton, just following up on that, let's assume we do have the announced tender offer and by its terms, it terminates on January 1st. Thereafter the bidder commences acquiring securities in the open market of the same target company. You have indicated that that type of activity, if there was a program to make such acquisitions in your opinion should be deemed a tender offer.

When we talk about a program for such

o16 acquisitions, would you distinguish between the amount of securities so acquired on the open market or not?

MR. LIPTON: Yes. Discussion we had previously with respect to that 2 percent or some small percentage limitation I think would be applicable here, that there is no reason to make the Williams Act applicable if the open market purchases are limited to no more than 2 percent or some other small percentage in any 12-month period.

I think with respect to each of my answers to Mr. Myers' questions in the series, I at least was assuming the discussion we had previously with respect to the small percentage exception so as to not require the expensive compliance where the purchasing activity will not have any of the effects that the Williams Act is designed to bring.

HEARING OFFICER LEVENSON: I assume you took the 2 percent through analogy to the 2 percent as expressed in the statute, with the exception?

MR. LIPTON: That is right. As I indicated before, I have no great feeling for 2 percent as distinguished from 1 percent or 3 percent.

MR. MYERS: With regard to the privately negotiated transaction, you suggest some type of numbers test.

I was going to follow that up by asking, do you

think that should be other criteria, something along the lines of Rule 146? Should we look at the relationship of the offeree, solicited shareholders to the target company, whether financial advisors or brokers are involved in those transactions, things of that sort?

MR. LIPTON: Basically what I have in mind is an acquisition type transaction. I suppose what I would do is limit it to only those transactions in which control of the corporation is acquired pursuant to agreement or a related series of agreement in which each shareholder party receives substantially equal treatment.

In other words, I don't really envisage a small number of solicitees as an exception from any of the things I have said previously. I would think that the 2 percent or other percentage limitation would be applicable. It really doesn't matter how many solicitees or sellers there are, but that it would be appropriate in those acquisition type transactions that involve closed corporations but those with 100 or 200 shareholders, that Williams Act compliance not be necessary where it is a company acquiring control of another company for cash and all of the shareholders are being offered substantially equal treatment.

I say substantially because sometimes I don't want to run into the problem of management having employment

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contracts or things like that, and then that being held to destroy the equality of treatment between the management shareholders and the non-management shareholders, provided that that is not being used as a disguise to have really different consideration, one to the other.

I don't see any real need for Federal intervention at that point through the Williams Act when what you have is a closed company being acquired by somebody else.

MR. MYERS: Talking about substantially equivalent treatment, is there anything in the Williams Act which would prohibit approaching the management of a company and offering them a certain price for their stock and then they can tender offer at a different price?

MR. LIPTON: Well, if the transactions are integrated, then you would violate 14-D and you also have violated 10-B-13.

MR. MYERS: Which would again be a factual question?

MR. LIPTON: Yes. I would think there is a very slim factual question if what you have done is bribe management into facilitating your later tender offer.

MR. MYERS: In regard to the private transactions, would you have any problems with the offering company at about the same time making open market purchases?

MR. LIPTON: Are you referring to Yellow Freight?

MR. MYERS: I am not referring to any particular case, but a situation that you pose, where there are negotiations with management to acquire shares.

MR. LIPTON: This is a private closed company?

MR. MYERS: Well, the transactions are private in the sense that they are negotiated. I mean there are no public announcements, advertisements, like other problems which exist in publicly announced cash tender offers. They might not exist in that situation.

(After recess: 11:40 a.m.)

HEARING OFFICER LEVENSON: The hearing will come to order and resume.

Counsel Meyers, will you resume, please.

MR. MYERS: Thank you, Mr. Levenson.

Prior to the recess, we were discussing one situation where one price was offered to several insiders, control people in corporations, where a tender offer was made, and in your opinion, you suggested that depending upon the facts there might be integration of these transactions and you would view the transactions as one tender offer.

Do you have any problems under the Williams Act with different prices being offered to shareholders in one tender offer?

MR. LIPTON: If you say in one tender offer, you define a violation for the Williams Act.

The real question is whether you have one tender offer or whether you have two separate transactions, one a transaction that is not a tender offer and the other which is a tender offer.

I find it very difficult to separate the two, particularly when it is a transaction with management, but I find no difficulty in facilitating it if in fact what is happening is the shareholders are being afforded quality treatment.

In other words, I see nothing wrong with some body goint to the inside group of the corporation and making an agreement with that group to buy their stock for $30 a share, and in that agreement saying, as is frequently done, we agree to make a tender offer to all the other shareholders at $30 a share, and I don't think that there ought to be a Williams Act compliance problem because of the failure to file at the time the agreement was signed, etc. etc.

I think that for those compliance purposes, it is perfectly all right to separate the two transactions. I do see problems where someone goes to the inside group and makes a deal at $30 a share and then later on, makes a tender offer at $10 a share to the other.

Now, I know that the equality of the treatment argument has not been accepted.

In other words, premium for control and the requirement of the equality of treatment has generally not been accepted in any state other than California, and there, too, it is questionable as to the scope of the equality of treatment, equality of opportunity concept.

But the Williams Act mandates a Federal equality of treatment for tender offer and it becomes a question of interpretation.

Everybody in a tender offer has to be

afforded equal treatment.

Now, I think you get to a factual question as to what the parameters of a tender offer may be when you have a situation where you have an agreement with management, shortly thereafter and offer it to the other stock holders, I find it very difficult to find that is one tender.

MR. MYERS: Under the Williams Act must a tender offer be made to all the shareholders of a corporation?

MR. LIPTON: I think so.

MR. MYERS: Do you know of any particular provision for coming to that conclusion?

MR. LIPTON: I don't have the language in front of me. I don't think it is necessary to point to any particular provision, any section.

I don't see how you can fulfill the legislative purpose of equality of treatment without making the offer to everybody.

I don't see how you provide for proration, et cetera, without offering to everyone.

I can countenance an exception if there is a problem. In other words, I can see not offering to somebody whose shares are tainted. I can see not offering to somebody who is prevented by one reason or another from tendering.

In other words, if you have got interferring state law, frequent problem is with respect to some of the state that have enacted special tender offer legislation. Essentially, devices have been developed through dealer offers in Ohio, Indiana, pre-clearance in Wisconsin, to facilitate offers.

I have had no difficulty in making cash tender offers uniformly throughout the United States. Half of the provinces of Canada preclude the transmission of the offer. There are other legal problems and practical problems in communicating the offer or accepting the shares from everybody. I am leaving that aside.

In other words, where some intervening law prevents the offer from being made to everybody, and Congress has not sought to preempt the field, then I think it is perfectly all right to exclude those persons from the tender offer, but I have -- I don't see how you comply with the proration and equality of price treatment of the $14 unless you offer to all shareholders.

MR. MYERS: Is there any difference between the offeror deciding not to make an offer to shareholders of certain states because of state restrictions as opposed to an offeror who theoretically attempt to make the offer to everyone, but because of certain state restrictions, finds that the offer cannot be made to every share-

holder?

Is that a theoretical distinction or is there any practical difference there?

MR. LIPTON: I am not sure I understand.

MR. MYERS: is there any obligation on the aprt of the offeror to attempt to make the offer to every shareholder?

MR. LIPTON: I think there is an obligation to make a reasonable attempt. In my experience, you always make a reasonable attempt.

I have never run into a situation where there was some benefit to be gained from not making a reasonable attempt.

You know, perhaps the Commission is aware of situations like that, but sometimes the time frame or the requirements make it impossible to comply, very difficult to comply.

Where it is impossible, the answer is clear. Where it is very difficult, I don't think it is necessary that strenuous effort be made. You do the best you can in order to have the ofer broadcast to everybody.

One of the areas that I think is of much more concern than the disability to communicate the offer in a particular jurisdiction or a parcicular person is the method of general communication of the offer where the

You solve that problem when you, if you require that the stockholder list be made available for cash tender ofers.

But where the stockholder list is not available you have to rely on newspaper advertisement. At the present time, you have a situation of uncertainty as to what disclosure is required in order to make sure you have in fact made your offer. You are more aware than I am of the current thinking of the Commission.

I know it changes from time to time, as to the necessity for long-form advertisement and the area in which that advertisement has to appear.

One of the things that I think the Commission should keep in mind is if the disclosure requirements are brought in so that offers get longer and longer, it is almost a necessity that that be accompanied with the mandatory provision of the stockholder list, because it is going to become impractical to publish the offer.

The customary offer in the last few years has expanded from one page to a page and a half to two pages. It used to be an offer would appear on one full page of the Wall Street Journal. Now you see them go a page and a half, come two pages.

If you increase the amount of disclosure, you can end up with the practicality of communication, in the

non-stockholder situations.

MR. MYERS: One wonders if the utility of advertisements which are now running over two pages in the Wall Street Journal in regard to the ability to communicate with shareholders and adequately disseminate necessary information to make a decision whether or not to tender, where ads are getting longer and longer, do you think one solution to that problem would be some type of short form notice, the statement that more detailed information could be obtaind from the following sources?

MR. LIPTON: Yes, I do, but I have been told by the Staff that that is not presently acceptable, that where the offer is not being mailed to all shareholders, it is my understanding the Staff position is that the long-form ad has to be published.

MR. MYERS: Is the publication which is required by §14 one.

I have no further questions.

MR. LIPTON: I don't know. That has changed from time to time. I don't know what the current thing is, but the last I have heard is that if the offer is not being mailed to the shareholders then the short-form ad by itself is not sufficient; at least, one place where it is reasonably calculated to get to a good part of the shareholders you have to have a long-form ad and you use the

short-form ad in other regions, areas, et cetera.

There is one case that holds that the publication in the home state of the corporation where a good part of the shareholders resided was a reasonable publication.

MR. MYERS: One more general type question:

The people who address themselves to the definition of the problem of the tender offer, some have suggested that the Commission should define the term "tender offer, others have suggested that we should define what is not a tender offer.

Do you have any views in summary concerning this definitional problem?

MR. LIPSON: I don't know that it really makes a difference. That is not something that I have given thought to, and I really don't feel that I should respond offhand as to whether it ought to be in the affirmative or an exception approach.

I am just not really equipped to respond to your question.

MR. PAULTER: Earlier, Mr. Lipton, you had referred to the imbalance between incumbent management and the offeror, although you thought that had been corrected to some extent by recent trend in the Second Circuit where offerors could amend their filings.

Could we focus on the filings that the management itself has to make?

I guess the basic question under the present statutory structure is does management have to make a recommendation to the stockholders?

MR. LIPTON: It is my understanding that management does not have to make a recommendation in many tender offers management does not today make a recommendation. Management remains neutral.

MR. PAULTER: Is that a realistic position for management to take, to say, to publicly claim it is neutral or else simply not to publicly claim anything.

MR. LIPTON: Yes. I think it is a realistic position for management to take. I have grave problems with management opposing a tender offer for no valid reason, other than it wants to stay in office and run the company, and I think management that refuses to facilitate the communication of a reasonable tender offer by reasonable people to shareholders is violating its duties to the shareholders of the company.

MR. LIPTON: That is not a Williams Act violation, but I think that such management is not properly discharging its function.

MR. PAULTER: When management does determine that it is going to oppose a take over, do the present

requirements of the Commission call for sufficient disclosures of management's position on these matters, the reasons why it is opposing?

MR. LIPTON: Yes. I think so.

On disclosure, my basic philosophy is that as you specify in more and more detail, you lose the most important disclosure objective and that is to give an over all balanced position, and I think I would be just as prone to rely on 10B5 and 14E as to come up with a detailed schedule of disclosure items.

MR. PAULSEN: Leaving 14D for a few moments, and returning to 13D, in your earlier comments you suggested that the ten day filing requirement in 13D be reduced to two or three days. I believe.

For the record, what in your view is the purpose of 13D, and how is that better served by shortening the reporting time?

MR. LIPTON: the purpose is to notify the world that somebody has passed this five per cent threshold.

Usually, they don't pass the five per cent threshold unless they have something in mind, whether it be tender offer or not is problematic.

Most institutional investors try to keep their positions below five per cent for one reason or another, either liquidity or some regulatory reason.

If somebody passes the five per cent mark, he may be going all the way, so that is important information for the company and for the market as a whole.

There are some people who are known to make tender offers. They have had a history of making, acquiring five per cent of the company and have made a tender offer.

I see no reason why there ought to be a ten-day waiting period. In those instances where you have a notorious aggressor, the sooner the information is in the market, the better off everybody is, including the aggressor.

MR. PAULTER: One of the inquiries in the proceeding is whether that five per cent threshold ought to be lowered itself to two per cent, one per cent or something of that sort.

MR. LIPTON: I have no real feeling with respect to that. I have no personal opinion as to whether it ought to be five per cent or some other figure.

I think you get to a point where you lose the benefit of disclosure if you have too much disclosure.

I mentioned before the Wall Street Journal announcements of corporate repurchase programs and how they have lost all impact on the market.

I think if that risk that appears in the News Digest of 13D filings was to run for page after page

at the one per cent level, two per cent level, perhaps the benefit of threshold disclosure at five per cent would be lost. That is something to keep in mind.

I have no real feeling one way or the other.

, 14D?

MR. PAULTER: I did want to get your opinion also for the record, both in 13D and 14D we are focusing on when a person takes a certain action whereby he becomes a beneficial owner of a specified amount of certain classes of securities.

Should the Commission attempt to define the term person, or adopt the rules, particularly in relation to collective persons or groups?

MR. LIPTON: I don't think that is necessary.

MR. PAULTER: Because of case law?

MR. LIPTON: I think the case law is fairly clear. I don't think anybody has any real difficulty in knowing whether he is operating within a group or not.

I see some problems under 13D with respect to investment management accounts where you would have one manager managing several different accounts.

And in the aggregate, they pass the five per cent limitation. I think most people have interpreted 13D to mean that if you don't have any control intent or voting intent with respect to those shares, and it is

true in an independent investment determination, it is not possible to file under 13D; they haven't filed and there is nothing wrong with not filing.

Obviously, if there is intention, either initially or some other time to act in concert with respect to some transaction involving that company, then the grup group will be formed at that point in accordance with the Milstein case and the filing that is necessary at that point.

I would think if there is any change in this area, then the condition should implement the statutory authorization for a short form of 13D filing and also if the threshold was to be lowered, I think it would be appropriate to have a very short form notice on behalf of those people who have no control or acquisition intent and who have acquired purely for investment purposes.

That might be limited solely to banks, trust departments, mutual funds, registered investment companies.

Everybody else would have to file the long form but where an institutional investor has no control or acquisition intent or no warehousing purpose, then he ought to be able to file a very simple short form if it is necessary for him to comply.

MR. PAULTER: Very closely related, rather than looking at the investment manager and his accounts as

a group, I was approaching it, what is the beneficial owner. Do you have feelings what we should focus on for Williams Act purposes?

MR. LIPTON: Well, the cases are very clear, the Bath industry case, all clearly focus on voting. I think that is a pretty good focal point. I am not so sure that anybody is capable of coming up with a more precise or better definition of beneficial ownership for Williams Act purposes

I see a distinction between beneficial ownership purposes and other reporting purposes, short swing recovery purposes under 16B than for Williams Act reporting purposes.

I don't think they necessarily should be defined in the same way.

MR. LEVENSON: Mr. Lipton, let's put aside Section 16, short term profits in the context of beneficial ownership.

Let's shift to the context of a proxy statement or a prospectus, or a 10K. What is your position, if any, as to whether beneficial ownership for those purposes should be defined to include voting power?

MR. LIPTON: Well, I have always assumed it to include voting power, Mr. Levenson, so I would certainly have no objection to a definition that defined beneficial

ownership as having the power to vote or to cause the voting of shares.

My own approach to it would be broader than just immediate voting power.

I assume that defining beneficial ownership, contractual rights to acquire ownership or voting power in the future, even not presently exercisable, are necessary in order to make complete disclosure with respect to beneficial ownership, and perhaps release or a rule that would say that you can just limit it to traditional concept of beneficial ownership.

That is, having the right to get the shares if you ask for them, but must include voting and contractual rights to obtain either ownership or voting rights in the future is encompassed within beneficial ownership would be the way to approach it.

I don't know very much more than that is necessary.

Mr. Leverson: Switching to one further question before we turn the meeting over to counsel, you were discussing the concept of a group in the context of 13D, for example, let us assume several institutions are considering an investment in a particular company and each one, if the investment is consummated, would own a substantial amount, but less than five per cent of the

equity securities, but in the aggregate, all the institutions would have been acquiring more than five per cent.

Further, let us assume that no one of these institutions would make the purchase unless all the designated institutions made the purchase.

Would that trigger a 13D filing by each of the institutions?

MR. LIPTON: After the acquisition?

MR. LEVENSON: Yes.

MR. LIPTON: I see no reason not to have a 13D filing, at least if you implement the short form filing to report that.

I don't see why there ought to be any objection to reporting that. The difficult question was the one I was afraid you would pose, whether that required 14D compliance before undertaking the buying program.

I am afraid I am not prepared to answer without giving that more thought..

MR. LEVENSON: I was getting to that.

You jumped the gun on me.

MR. LIPTON: I see no reason to not have that reported, but I am just really not prepared to answer the 14D question..

I have not considered that before and I can see important arguments on either side.

It is very rare that you find group of individuals who would purchase in that magnitude, except if they had an acquisition of control kind of transaction in mind.

I think from an ease of administration standpoint, I would provide for the short form for institutions because generally information with respect to them is readily available from other sources and I would continue the long form with respect to individuals.

COMMISSIONER EVANS: The question I want to ask, it almost means there must have been some feeling of control because you have suggested that they would not, each of them would not purchase unless the others did.

MR. LEVENSON: Not necessarily, Commissioner Evans, because it may not be unusual for the institutions not to participate unless a certain aggregate dollar amount was invested in the company and accordingly they may not be under common control.

In fact, let us assume they are not. Let us assume they are each independent insurance companies but they believe the company to be invested in has a viable future, but only if it received $15 million, and therefore they are willing to take a piece, say, $2 million, but they won't be willing to go into the deal unless everybody

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You do create a substantial difficlty for the managers of a number of substantial accounts.

In other words, if you have one of the major money center banks that manages a number of different pension trusts, or you have got one of the big mutual fund complexes where for purposes of complying with either their own internal policies with respect to fair treatment of all of the accounts that they manage, or to discharge their duties as trustees, they must go beyond a five per cent point but in fact, they have purchase investment intent, and do not intend an acquisition or control kind of transaction.

I see a very substantial policy argument, but not requiring 14D disclosure.

When you view it from the standpoint of the public and the market itself, you raise the kind of 10B5 market information disclosure question that we were discussing before.

COMMISSIONER EVANS: Is the answer to that question any different if these are individuals than if they were individuals as far as 14D filings are concerned?

MR. LIPTON: If they are individuals who are just private investors and the market activity is no different than of an institution, my answer would be the same.

else came in and put in the $2 million.

COMMISSIONER EVANS: I see.

MR. SIEGAN: In the absence of mandatory shareholders lists that you suggested earlier, you appear to suggst that the use of a short form advertisement would be within compliance with the statute, so long as it provided where the tender offer would be obtained.

In such a situation, would the withdrawal provisions and the pro rata provisions commence uniformly and if so when would they commence?

MR. LIPTON: I would think that the offeror would be well advised to expand the seven-day and ten-day periods.

In my own practice, I always add a few days to the seven and ten-day periods when I have some question as to the publication on the theoretical offer dates, so that I can't be faced later on with the contention that the offer wasn't actually made on the day that I thought I was making it, because of some communication difficlty; the same even when relying on mailing. We generally calculate from the day that most people would receive the mailing, rather than from the day of filing or the day that the mailing is made, but that is out of abundance of caution to provide a problem.

It seems to me that the only really effective

solution is to require the shareholder list to be made available to the offeror.

Anything else is a half-way measure and does not meet the objective of being sure that those people who most need the protection of the Williams Act obtain it.

I would couple that with the requirement that if you can get the list, then you have to use the list.

In other words, you must mail the offer to every shareholder to whom you can mail it, assuming that there may be a legal impediment to mailing it in certain jurisdictions.

But I think they are concomitant, that the list ought to be available and the mailing ought to be mailed to them.

MR. SIEGAN: You indicated earlier that intent was the key to what I would call the conversion of open market purchases into a tender offer.

You also said that in your opinion there is very little difference between the plans.

In your submission, you talk about intend and plan. I assume that your experience will support a witness who indicated that insofar as intentions or plans are concerned, he was advised never to have anh intentions or plans, and we have seen in our office that with respect

to intentions or plans, or purpose of the transaction, that the person filing provides himself sufficient options to go almost any way.

This would appear to me to indicate that we would result with boiler plate language insofar as your int ent position is concerned.

Is there any happy medium?

MR. LIPTON: I have been unable to find it.

This was not a submission. It was just an outline and nothing that is said in the outline should be assumed to be an assertion.

I think you are misreading the outline in your characterization of what it says.

As I said before, I draw no distinction between plan or purpose or intent.

I think there is a factual question as to what the plan , purpose or intent is but I don't see any gradation of difference between a plan, purpose or intent.

I find it very, very difficult in everyday practice to write up what the intent, plan or purpose is of the business man who in fact is uncertain as to what he is going to do, and I agree that a form of kind of stylized boiler plate has evolved to comply with item 4 of the 13D, with respect to somebody who passes the five per cent threshold and hasn't made up his mind, but I think that is

an inherent difficulty whenever disclosure of future purpose for intent is necessary.

What it has to be is honest and if in fact somebody is unsure of himself, there should not be any impediment to saying, "I don't know what I am going to do. I haven't made up my mind. I reserve the right to do anything I please to do. I may sell the stock; I May continue to hold it. I may make a tender offer. I reserve to myself all of the options."

I see no reason to foreclose the ability to make that kind of disclosure.

MR. SIEGAN: So the only way we would know the intent would be with 20-20 hindsight?

MR. LIPTON: But that is true with respect to any question of intent, that when you are talking about future plans, they are always subject to change, and I am not trying to countenance somebody making a misleading or erroneous disclosure, if in fact someone has an intent to do so.

That has to be disclosed and I think that most people try to describe the objective indicia, at least from past actions, at least since the A & P case, in case there is any qaestion about it.

In the A & P case, Gulf and Western said they had no intent to acquire control and the court in effect

held that it was a disclosure violation not to disclose that in a number of other instances after having acquired a position in the company they sought control, so that you begin to sort of build up a pattern of disclosure that maybe isn't necessary or really very helpful and that it would be a lot better if everybody understood that when he hadn't made up his mind, all he had to do was say, I bought the stock and I haven't made up my mind what I will do at the moment. As soon as I make up my mind, I will file again and tell you.

MR. SIEGAN: But with the current disclosure, when would you get the filing?

The options are always remaining open to him.

MR. LIPTON: As soon as it changes. I mean, if there is any change, he must promptly report it.

MR. SIEGAN: Do you think that preliminary negotiations or discussions with management would be desirable disclosure?

MR. LIPTON: It depends on whether or not te they are material to the disclosure.

Under certain circumstances, I think indeed they are. Under others, I can see that they are not very meaningful.

One of the problems, I faced this issue in a number of situations --

MR. LEVENSON: Excuse me, Mr. Lipton.

I notice the time is running. I wonder if we can get on to a different area of questioning, something that we can get our teeth into, because this intention area has its pregnancy, so to speak, and counsel would you continue on a different line, please?

MR. LIPTON: Mr. Levenson, I have a time problem. I have five more minutes.

MR. LEVENSON: That is what I was concerned about.

MS. PEACH: There has been a lot of activity in recent months in the area of going private, to issue tender offers.

Have you given any thought to or do you have any feeling as to whether certain protections of the Williams Act that are not now given to stockholder in issue or tender offers should be applied to them and if so, which particular areas do you think would be the most profitable?

MR. LIPTON: I think on balance, I feel that the Williams Act protections ought to be applicable to corporate repurchases and I don't really see a distinction between the corporattion repurchasing its own shares or somebody else buying them.

In fact, from a disclosure standpoint, the

information readily available to the corporation, It should make it available to its shareholders, and in fact, as a matter of practice, I think the disclosure and repurchase offer documents is far more complete than that in third party tender offers and it is in the corporate repurchase document that the most experimentation with respect to projections, estimates and appraisals is taking place, because people have deemed that to be more cogent with respect to repurchase than with respect to the offering of securities, and at least in terms of where you know that your values are greater than they appear to be, when I guess in theory you can argue it either way, but I think that the repurchase situation essentially should receive Williams Act kind of disclosure and compliance.

I have great trouble, just as an individual, with companies' repurchasing the shares. I think that personally I would come out on the English side, and that sh ould not be permitted.

I wonder if the long run economic benefits of companies' repurchasing their own shares, but that really has nothing to do with this question.

MS. PEACH: There has been a great deal of problems, at least a great deal of complaints from stockholders in recent months about these so-called freeze-outs that they feel that as one witness said yesterday, they

have been sold in a bull market and are being brought back in a bear market.

Are these the kind of things you are addressing yourself to that you feel there are problems with, outside of the securities laws?

MR. LIPTON: I think so. I think you have to recognize that the repurchase provides liquidity to those shareholders who otherwise it would not happen, but the inherent unfairness of going public at 20 times earnings and buying back at half of book value, which is three or four times earnings, is something that I don't think the public will ever accept.

Those people, you know, lawyers and securities regulators, et cetera, can make out a theoretical justification or argument one way or the other, but the public is never going to really accept it.

It is all quite legitimate if somebody can sell stock at 20 times earnings and then buy it back in two or three years at three or four times earnings.

That is one of those things that the public just won't buy.

I think from the Federal Securities Laws standpoint, it presents unusual disclosure problems, and disclosure has to be sweetened in this area, but substantively I don't know that there is any Federal securities law

jurisdiction with respect to it.

MR. LEVENSON: Let us assume that the purpose of the repurchase is to eliminate minority shareholders.

Would you ranswer be the same, bearing in mind Rule 10B53?

MR. LIPTON: I don't know.

MR. LEVENSON: In other words, all the assets are going to wind up with the majority shareholders?

MR. LIPTON: I don't know, Mr. Levenson.

There are now two cases that indicate that a deliberate freezeout, at least in a relatively close corporation situation, could be a10B5 violation.

The Bryant case went off on it being a violation of Georgia Corporate law.

This Baldwin and Sawyer, I think the New York case indicates a dictum and a motion to dismiss the complaint, that it could be in fact be a violation of 10B5, if it is not a clear holding.

The Crimes case indicates where there is some corporate purpose in addition to freezing out the minority, that it is not 10B5 violation.

I am a little hesitant to extend 10B5 to this point. I think if we are going to have better corporation law in this area, it probably ought to be independently considered, rather than fitted within 10B5 to cover this

sort of this.

MR. STUCKI: Just one more question, Mr. Upton:

For the record, what additional disclosure items would you feel appropriate for Schedule 13D order in a different schedule, if we adopt Schedules for tender offers or acquisitions?

MR. UPTON: I don't think it is necessary to specify additional disclosure.

Right now, you have a requirement for 13D, 13E and 14D a full and complete disclosure, no ommission of material facts, et cetera.

I think a reasonable disclosure document has evolved.

I think if you, as I indicated before, if you increased the disclosure very much in this area, you are going to have an adverse impact on the use of tender offers.

MR. MYERS: Commissioner Evans, Commissioner Pollack do you have any further questions?

COMMISSIONER EVANS: No.

COMMISSIONER POLLACK: No.

MR. MYERS: Mr. Levenson.

MR. LEVENSON: First I want to indicate our appreciation of your taking the time to appear and give

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testimony and also the thoughtful, constructive suggestions you have made.

There were a few areas that you indicated during the questioning that you did not give thought to and prefer not to answer at this time.

If at your convenience time does permit, we would be receptive to a written submission to supplement the response in that regard.

Other than that, I do realize we are running late this morning. We have another witness pending, and in order to work out an appropriate arrangement with the next witness, we will adjourn for two minutes.

We might adjourn for lunch, but that will be settled within two minutes.

Thank you, Mr. Lipton.

(Short recess.)

MR. LEVINSON: Back on the record.

This proceeding will adjourn and resume at 1:30 p.m.

(Recessed for luncheon at 12:25 p.m.)

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

In the Matter of:

BENEFICIAL OWNERSHIP, TAKEOVERS AND ACQUISITIONS BY FOREIGN AND DOMESTIC PERSONS

File No. 4-115

Room 776
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C.
Thursday, November 14, 1974

The hearing in the above-entitled matter met, pursuant to adjournment, at 10:00 o'clock a. m.

BEFORE:

ALAN B. LEVENSON, Hearing Officer
MARY E. T. BEACH, Hearing Officer
RUTH D. APPLETON, Hearing Officer

ALSO PRESENT:

COMMISSIONERS JOHN R. EVANS
IRVING M. POLLACK

APPEARANCES:

On behalf of the Securities and Exchange Commission:

Donald J. Myers
Paul F. Pautler
Jerold N. Siegan

C O N T E N T S