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HEARING BEFORE THE SUBCOMMITTEE ON COMMERCE AND FINANCE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

NINETYETH CONGRESS

SECOND SESSION

ON

H.R. 14475, S. 510

BILLS PROVIDING FOR FULL DISCLOSURE OF CORPORATE
EQUITY OWNERSHIP OF SECURITIES UNDER THE SECURI-
TIES EXCHANGE ACT OF 1934

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JULY 1, 1968

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CONTENTS

Text of—	Page
H. R. 14475.....	2
S. 510.....	5
Report on S. 510 by—	
Federal Reserve System.....	8
Securities and Exchange Commission.....	8
Statement of—	
Calvin, Donald L., vice president, New York Stock Exchange.....	43
Cohen, Hon. Manuel F., Chairman, Securities and Exchange Commission.....	10, 47
Loomis, Philip A., Jr., General Counsel, Securities and Exchange Commission.....	10
West, Phillip, vice president, and director, Department of Stock List, New York Stock Exchange.....	43
Additional material submitted for the record by—	
American Bankers Association, Washington, D.C., letter from Charles R. McNeill, director, Washington office.....	69
American Home Products Corp., New York, N.Y., telegram from Gilbert S. McInerny, vice president and general counsel.....	36
American Life Convention, Chicago, Ill., letter from William B. Harman, Jr., general counsel.....	69
Arnstein, Gluck, Weitzenfeld & Minow, Chicago, Ill., letter from Leo H. Arnstein.....	71
Association of the Bar of the City of New York, letter from Thomas A. Halleran, chairman, Committee on Securities Regulation.....	73
Biegel, Herman C., attorney, Washington, D.C. statement.....	65
Cardon, John A., attorney, Washington, D.C., statement.....	65
Chamber of Commerce of the United States, statement by Ralph W. Hemminger.....	59
Commerce and Finance Subcommittee: Correspondence between Chairman Manuel Cohen, SEC, and Hon. Harley O. Staggers, re New York Stock Exchange trading involving Chicago & North Western Railway Co. stock on August 7 and 8, 1967.....	56-59
Eskin, Jordan H., attorney, New York, N.Y., statement.....	62
Johnson & Johnson, New Brunswick, N.J., letter from Arthur S. Lane, general counsel.....	34
Life Insurance Association of America, New York, N.Y., letter from Kenneth L. Kimble, vice president and general counsel.....	69
Moss, Hon. John E., newspaper articles on Crane Co.-Westinghouse Air Brake Co. takeover bid.....	23
National Association of Manufacturers, Government Finance Department, New York, N.Y., letter from Maurice H. Stans, chairman, Money, Credit, and Capital Formation Committee.....	70
Securities and Exchange Commission:	
Letter dated July 1, 1968, from Chairman Manuel Cohen, SEC, to Chairman John E. Moss, re data on number of tender offers.....	21
Letter dated July 9, 1968, from Chairman Cohen to Hon. Harley O. Staggers, re Crane Co. takeover bid.....	75

CONTENTS

1-2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
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TAKEOVER BIDS

MONDAY, JULY 1, 1968

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE AND FINANCE,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2322, Rayburn House Office Building, Hon. John E. Moss (chairman of the subcommittee) presiding.

Mr. Moss. This morning the Subcommittee on Commerce and Finance is conducting hearings on two bills, H.R. 14475 and S. 510, which have for their purpose the amendment of the Securities and Exchange Act of 1934 to provide for additional disclosure of the ownership of the corporate equity securities, particularly as such disclosure relates to acquisition of securities as the result of tender offers and the equitable treatment of the persons tendering their stock in response to such offers.

I am certain that we all are aware from a reading of the daily papers of the tremendous number of offers to purchase stock which consistently are being made both for cash and for the exchange of other securities. The opportunities which are present for the acquisition of shares without the investor who tenders his shares as a result of the offer being adequately informed of the facts on which he can appraise the merits of the offer, or indeed the merits of retaining his interest in the corporation, are all too evident.

The legislation here being considered provides for disclosure in connection with cash tender offers for accumulating large blocks of equity securities through the requiring of filing of information with the Securities and Exchange Commission.

It is not the purpose to prevent the making of any such offers, but solely the purpose of seeing that investors adequately are informed of the relative merits of their position before and after accepting such offer so that they can make a judgment properly required.

The bill H.R. 14475, which I introduced, is substantially in the same form as S. 510 passed the Senate except for the specific inclusion of a coverage of securities issued by a closed-end investment company and for certain provisions having to do with the time of filing of the information statement with, and its review by, the SEC.

At this point in the record we shall include the legislation under consideration and such agency reports thereon that are available.

(H.R. 14475 and S. 510, and departmental reports thereon, follow:)

[H.R. 14475, 90th Cong., first sess.]

A BILL Providing for full disclosure of corporate equity ownership of securities under the Securities Exchange Act of 1934

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 12(i) of the Securities Exchange Act of 1934 is amended by striking out "sections 12, 13, 14(a), 14(c), and 16" and inserting in lieu thereof "sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16".

SEC. 2. Section 13 of the Securities Exchange Act of 1934 is amended by adding at the end thereof the following new subsections:

"(d) (1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 10 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

"(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

"(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a) (6) of this title, it will be sufficient to so state;

"(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

"(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

"(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

"(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

"(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for the purposes of this subsection.

"(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

"(5) The provisions of this subsection shall not apply to—

"(A) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

"(B) any acquisition of an equity security by the issuer of such security ;

"(C) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

"(e) (1) It shall be unlawful for an issuer, to purchase any equity security which it has issued in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or in order to prevent such acts and practices as are fraudulent, deceptive, or manipulative. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

"(2) For the purpose of this subsection, a purchase by or for the issuer, or any person controlling, controlled by, or under common control with the issuer, or any bonus, profit sharing, pension, retirement, thrift, savings, incentive, stock purchase, or similar plan of the issuer or any such person shall be deemed to be a purchase by the issuer."

SEC. 3. Section 14 of the Securities Exchange Act of 1934 is amended by adding at the end thereof the following new subsections:

"(d) (1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 10 per centum of such class, unless five days prior to the date copies of such material are first published or sent or given to security holders, such person has filed with the Commission a statement containing such of the information specified in section 13(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Preliminary copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission at least two days prior to the date copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders. All copies of preliminary statements filed with the Commission hereunder shall be for the information of the Commission only, except that such statements may be disclosed to any appropriate department or agency of Government and the Commission may make such inquiries or investigation in regard to such statements as may be necessary for an adequate review thereof by the Commission. Definitive copies of all statements, in the form in which such material is furnished to security holders, shall be filed with, or mailed for filing to, the Commission and shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders. The time periods contained in this subsection may be shortened as the Commission may direct.

"(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for purposes of this subsection.

"(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

"(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

"(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders or at any time thereafter until taken up by the offeror, subject to such terms and conditions as the Commission may prescribe by rules and regulations as necessary or appropriate in the public interest or for the protection of investors.

"(6) Where any person makes a tender offer or request or invitation for tender for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor, except as the Commission may otherwise prescribe by rules and regulations as necessary or appropriate in the public interest or for the protection of investors.

"(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

"(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

"(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

"(B) by the issuer of such security; or

"(C) which the commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

"(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

"(f) If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 13 of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders."

[S. 510, 90th Cong., first sess.]

AN ACT Providing for full disclosure of corporate equity ownership of securities under the Securities Exchange Act of 1934

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 12(i) of the Securities Exchange Act of 1934 is amended by striking out "sections 12, 13, 14(a), 14(c), and 16" and inserting in lieu thereof "sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16".

SEC. 2. Section 13 of the Securities Exchange Act of 1934 is amended by adding at the end thereof the following new subsections:

"(d) (1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title, is directly or indirectly the beneficial owner of more than 10 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

"(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

"(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a) (6) of this title, it will be sufficient to so state;

"(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

"(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

"(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

"(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

"(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for the purposes of this subsection.

"(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

"(5) The provisions of this subsection shall not apply to—

"(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

"(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

“(C) any acquisition of an equity security by the issuer of such security ;
 “(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

“(e) (1) It shall be unlawful for an issuer, to purchase any equity security which it has issued in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or in order to prevent such acts and practices as are fraudulent, deceptive, or manipulative. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

“(2) For the purpose of this subsection, a purchase by or for the issuer, or any person controlling, controlled by, or under common control with the issuer, or any bonus, profit sharing, pension, retirement, thrift, savings, incentive, stock purchase, or similar plan of the issuer or any such person shall be deemed to be a purchase by the issuer.”

Sec. 3. Section 14 of the Securities Exchange Act of 1934 is amended by adding at the end thereof the following new subsections :

“(d) (1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 10 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 13(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

“(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a ‘person’ for purposes of this subsection.

“(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

“(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

“(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or

invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

"(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

"(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

"(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

"(A) proposed to be made by means of a registration statement under the Securities Act of 1933;

"(B) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

"(C) by the issuer of such security; or

"(D) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purpose of this subsection.

"(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

"(f) If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 13 of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders."

Passed the Senate August 30 (legislative day, August 29), 1967.

Attest:

FRANCIS R. VALEO, *Secretary.*

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., October 16, 1967.

HON. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, House of
Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of September 11, 1967 requesting our comments on S. 510, as well as your earlier letter requesting our comments on H.R. 12210.

S. 510, as passed by the Senate, reflects many changes made by the Senate Banking and Currency Committee in the bill originally introduced, including a number of changes suggested by this Commission. While the Senate Committee did not adopt all of the suggestions we made, we believe the bill passed by the Senate is a constructive approach to a problem which requires Congressional attention.

On the other hand, we would like to have the opportunity to submit for the consideration of your Committee a statement in support of the recommendations which we made to the Senate Committee which were not embodied in the bill enacted by the Senate. We believe that these further changes would materially improve an already good bill. In addition, we have some further changes to suggest to close a gap in the coverage of the bill which was brought to our attention recently. We are now preparing a statement incorporating these recommendations which we hope to submit to you shortly or at such time as public hearings on the bill are held by your Committee.

In regard to H.R. 12210, we note that it is substantially identical to S. 510 as originally introduced. The statements which we submitted to the Senate Committee set forth in detail our difficulties with that measure in its original form. We therefore believe that S. 510, as passed by the Senate, or any comparable legislation that may be introduced in the House, would be a more useful starting point for your Committee's deliberations.

Sincerely,

MANUEL F. COHEN, *Chairman.*

BOARD OF GOVERNORS,
FEDERAL RESERVE SYSTEM,
Washington, D.C., October 31, 1967.

HON. HARLEY O. STAGGERS,
Chairman, House Interstate and Foreign Commerce Committee,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: S. 510, now pending before your Committee, would provide for disclosure of ownership of corporate equity securities under the Securities Exchange Act of 1934. The Board of Governors is in accord with the purposes of this bill, particularly as it would require disclosures relating to acquisition of substantial interests in banks, and equitable treatment of persons tendering bank stock in response to purchase offers. Bank stock could become less attractive as an investment, with the result that banks might find it more difficult to raise needed capital, if the interests of minority shareholders are not fully protected in connection with negotiations to merge or acquire banks. The proposed bill would take a noteworthy step toward providing minority shareholders with the opportunity for prior notice, and the equal opportunity to dispose of their shares, which the Board believes necessary both for equitable treatment and good business practice.

However, the Board notes that in its present form, the bill virtually exempts financing arrangements from disclosure where funds are provided by means of a loan made in the ordinary course of business by a bank. The Board is not aware of any reason why the same disclosure requirements should not apply to banks as to other lenders. In addition, as explained below, information as to bank financing of tender offers would materially assist the Board in carrying out its duties under the 1934 Act. For this reason, the Board would recommend deletion of the provision permitting non-disclosure of information relating to bank financing of tender offers. However, if your Committee believes, for any reason, that the name of the bank making such a loan should not be disclosed, the Board would urge that a provision be substituted that would accord confidential treatment to the identity of the bank lender.

The sharp recent increase in the number of tender offers has highlighted certain problems under the Board's Regulation U (Loans by Banks for the Purpose

of Purchasing or Carrying Registered Stocks), issued pursuant to section 7(d) of the 1934 Act, the statute which S. 510 would amend. A significant amount of credit may flow into the securities markets through this channel, which has escaped margin regulation for technical reasons. Such credit could be brought within the scope of margin regulation under existing law, but in order to reach an informed conclusion in this area it would be helpful if the Board knew a good deal more than it does at present about the amount and character of such credit.

Such information could perhaps be collected directly from banks, but this would impose an additional burden, particularly since reporting banks would first have to determine what loans involved "tender offers". The present bill places the responsibility for reporting on the borrower, who is in the best position to know the purpose of a loan. Thus, there would be less diffusion of responsibility and considerable economy of effort if the Board could be furnished with the information it needs under the program already envisaged by S. 510. At the same time, the interests of offerees would better be served if they had available to them information on the terms of bank financing for tender offers. What collateral was to be provided, how long the loan was to remain outstanding, and how it was to be repaid, are all matters that could affect the decision whether or not to accept a tender offer, regardless of the source of the loan.

An additional benefit would be realized in the area of supervision of the Board's Regulation U. Because such bank financing is typically short-term, the purpose of the loan has usually been accomplished by the time the situation comes to the attention of the supervisory authorities, and the loan has been, or is about to be, paid off. It would be helpful in ensuring compliance with the regulation if advice were secured that a particular bank was financing an offer at the time when the offer was first made.

Enclosure A herewith shows section 13(d) (1) (B) of the Act, as it would read with the exemption deleted, and Enclosure B shows the same section as it would read if non-disclosure of the lending bank's identity was substituted for the present complete exemption.

Sincerely,

J. L. ROBERTSON,
Vice Chairman.

ENCLOSURE A

Part of Section 2 of S. 510 (a bill providing for full disclosure of corporate equity ownership under the Securities Exchange Act of 1934), amending section 13 of the Securities Exchange Act of 1934, marked to indicate changes that would be made by an amendment proposed by the Federal Reserve System to omit the exemption for disclosure as to bank financing of tender offers (proposed deletion enclosed in black brackets):

"(d) (1) . . .

"(B) the source and amount of the funds or other consideration used or to be used in making the purchase, and if any part of the purchase price of proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto[.]; [except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3 (a) (6) of this title, it will be sufficient so to state:]"

ENCLOSURE B

Part of Section 2 of S. 510 (a bill providing for full disclosure of corporate equity ownership under the Securities Exchange Act of 1934), amending section 13 of the Securities Exchange Act of 1934, marked to indicate changes that would be made by an amendment proposed by the Federal Reserve System to provide that the exemption for disclosure as to bank financing to tender offers be omitted and in its place there be substituted a requirement that the name of the bank financing such an offer be kept confidential:

"(d) (1) . . .

"(B) the source and amount of the funds or other consideration used or to be used in making the purchase, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction

and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined by section 3(a)(6) of this title, it will be sufficient so to state; *if the person filing such statement so requests, the name of the bank shall not be made available to the public;*"

Mr. Moss. Our first witness this morning is the Honorable Manuel F. Cohen, Chairman of the Securities and Exchange Commission.

Mr. Cohen.

STATEMENT OF HON. MANUEL F. COHEN, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION; ACCOMPANIED BY PHILIP A. LOOMIS, JR., GENERAL COUNSEL

Mr. COHEN. Good morning.

Mr. MOSS. Good morning.

For the record will you identify the gentleman accompanying you.

Mr. COHEN. Gentlemen, I am accompanied by Mr. Philip A. Loomis, Jr., General Counsel of the Commission. At the outset I would like to express my appreciation for the opportunity to appear before you with regard to this proposed amendment to the 1934 act which in our opinion is very important and fills a gap in the existing scheme of investor protection, a gap which incidentally has been dealt with in other countries of the Western World for some time. I should also add, in particular, the most recent legislative action in this area is that which occurred in Canada. As you indicated, Mr. Chairman, I am here to testify on H.R. 14475 and S. 510, bills to amend the Securities Exchange Act of 1934. To repeat, the purpose of this legislation is to fill a gap in the existing scheme of investor protection with respect to the increasingly important area of so-called "takeover bids." These involve situations where someone makes a general offer to purchase the shares of a publicly owned corporation from the shareholders, usually with the objective of obtaining control and often as a prelude to a merger. I have a detailed statement which explains the reasons for this legislation, the need for it, and the manner in which it deals with the matter. In order to save the time of this committee I would like to introduce this statement for the record and to summarize briefly certain pertinent considerations, particularly recent development. With the permission of the chairman I will hand the full statement to the reporter for inclusion in the record.

Mr. Moss. Without objection, the full statement will be received for inclusion in the record at this point and you may proceed to summarize it.

(Mr. Cohen's prepared statement follows:)

STATEMENT OF HON. MANUEL F. COHEN, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION

Mr. Chairman and Members of the Committee, I am Manuel F. Cohen, Chairman of the Securities and Exchange Commission. I am here at your invitation to testify on H.R. 14475 and S. 510, bills to amend the Securities Exchange Act of 1934.

The bills are designed solely to fill a gap in the provisions of the Securities Exchange Act to cover planned acquisitions of large blocks of securities of publicly-held companies, where control of the company may be at stake. It is not intended to encourage or to discourage such activity or to provide management or any other group with special privileges over any other. This has become an

area of increasing significance in recent years and is to be distinguished from planned offerings of blocks of securities—dealt with primarily by the Securities Act of 1933, as well as ordinary trading of securities in the secondary markets which is the primary focus of existing provisions of the Securities Exchange Act.

The bills have a much closer relationship to existing provisions of the Exchange Act regulating solicitation of proxies, since acquisitions of blocks of voting securities are typically alternatives to proxy solicitations, as methods of capturing or preserving control. In either case there is involved a form of industrial warfare in which the stakes are high, and two or more groups are attempting to manipulate the public security holder to their own advantage. A proxy fight, as such, is an attempt to ruin the public security holder's vote, leaving him in a position to share with other security holders the advantages or disadvantages of the outcome of the struggle for control. The special problems of the block acquisition result from attempts to cause, or resist, a substantial shift of ownership away from existing security holders.

The bills before you deal with stock acquisitions in three specific contexts—first, the acquisition by means of a cash tender offer of more than ten percent of any class of stock of a publicly-held company; second, other acquisitions by any person or group of more than ten percent of any class of stock of a publicly-held company; and third, the repurchase by a corporation of its own outstanding shares. Each of these situations presents its own unique problems.

The Commission agrees that there is need for further protection of the public security holders in this area. We do not wish to imply, however, that block acquisitions should be encouraged or discouraged, or that the Commission should have power or responsibility to pass on the merits of a particular acquisition or proposal. As in most other areas entrusted to it, the Commission's responsibility should be limited to requiring appropriate disclosures, to guarding against deceptive and unfair devices designed to coerce or prevent action, and it should be provided with adequate tools to deal effectively with the various techniques that have been developed, and are continuing to be devised, to seek or to prevent takeover bids and other matters dealt with in the bill. Finally, adequate authority must be accorded to deal with the violations of these precepts—all designed to give the investor the fairest possible opportunity to make his own investment decisions.

TENDER OFFERS

I turn now to tender offers. Statistics recently published show that the aggregate of cash tender offers has grown from less than \$200 million in 1960 to almost a billion dollars in 1965, surpassing stock-for-stock tender offers, which aggregated about half a billion dollars in each of those years.

In this area the bills are designed first, to provide those who receive a tender offer with information adequate to an informed decision whether or not to accept; and second, to eliminate conditions surrounding the offer which discriminate unfairly among those who may desire to tender their shares or unreasonably restrict their freedom of action with respect to deposited shares at a time when there is no assurance that the tender of their shares will be accepted.

A tender offer is quite different from the ordinary market transaction with which the average investor is familiar. In so far as it is an offer at all it is subject to complex and sometimes deceptive conditions. Rather it is an invitation to the public security holder who "tenders" his security to give the other party an option—to be exercised only if certain minimum shares are tendered within a specified time and perhaps specifying a maximum which the original "offeror" is prepared to take—but giving him discretion to accept a lesser or larger amount or to extend the time limits. Tendering in response to such an offer involves deposit of the public security holder's shares or obtaining a guarantee from a stock exchange member or other financially responsible person that they will be deposited. Some conditions of this character may well be a practical necessity. Otherwise there would be no inducement to the originator of the tender offer to pay above the current market price.

But what has developed is a one-sided document. An early response may prevent the unwary investor from taking advantage of a later and better offer—or put him in the position of having given an option on his shares for a substantial period of time without any assurance that the deal will go through, or, if it does, that there will be no unfair discrimination in the acceptance of shares. Sometimes the offeror promises acceptance on a first-come first-served basis, which has the effect of increasing the pressure for a hasty deposit—so that those who respond do not have a chance to take advantage of later and better offers,

either from the same or a different source. Any tender proposal requires a security holder to make an investment decision and to do so under pressure. Typically, the price proposed is somewhat above the current market, and announced under conditions designed to leave the impression that immediate response is necessary. Typically, there is also no disclosure of the motives or plans of the person making the offer, or of the consequence to the particular investor of failing to tender his shares if a substantial percentage of the other security holders do so. Nor is there any explanation offered of any special pressures generated in the security markets as a result of the tender offer.

Information about a potential change in control can be particularly essential to an informed decision. A change in control brings with it the possibility of different operating results and different investment results, or perhaps the possibility of realizing on a company's liquidation value. This may be either good, or bad, depending on the facts and circumstances involved. But investors and their advisers cannot reach informed conclusions on the possible effects of a change in control until facts are available to them.

It is argued by some that the basic factor which influence shareholders to accept a tender offer is the adequacy of the price. But, I might ask, how can an investor evaluate the adequacy of the price if he cannot assess the possible impact of a change in control? Certainly without such information he cannot judge its adequacy by the current or recent market price. That price presumably reflects the assumption that the company's present business control and management will continue. If that assumption is changed, is it not likely that the market price might change? An example will show why. Assume that a company's stock sells for \$5 per share—its going concern value as assessed by investors. Its earnings are poor; its prospects dim; its management uninspired. Is a cash tender offer of \$6 per share adequate? Or do we need more information? Suppose a person believes that with control he can liquidate the company and realize \$15 per share, or maybe more. Certainly the company's shareholders would want to know about liquidation plans. Indeed, it is the plan to liquidate which makes the bidder willing to pay more than \$5 per share. Whether or not the company's liquidation value is generally known is not important, for without someone to carry out the liquidation, this value is unobtainable. If the company's shareholders, at the time of the tender offer, know of the plan to liquidate, would they consider \$6 per share adequate?

Where competing offers are made, at different prices, stockholders may have even more difficulty in making any sort of rational decision, and the confusion that develops in these situations can have a very serious adverse effect on public confidence in the integrity and openness of the securities markets. In one recent example, a small manufacturing company was the subject of a takeover bid by another company formed specifically for the purpose of making the tender offer by a group of persons whose identity was not disclosed. Two other companies made competing tender offers at the same time, a fourth corporation made an exchange offer and a fifth made an offer of merger. In these circumstances the shareholders were in no position to judge the significance of these competing offers or to compare the impact on the company of the cash offers with that of the exchange offer or the merger proposal. It is important to note that under existing law the proposed technique in at least two of the offers could have produced adequate information, but it would not have been possible to obtain comparable information with respect to the other offers.

One important potential protection to security holders is an opportunity for management to furnish any information at its disposal pertinent to the merits of the offer before the security holder responds to it. At the same time protection is needed against any management efforts designed to resist bids when the information furnished may be given in the context in which the desire to obtain existing emoluments may make difficult impartial and complete disclosure of relevant facts.

It would be naive to assume that tender offers are not, at times, opposed by managements motivated by their own interests in staving off a change in control. It would, however, be as much an unfair overstatement to suggest that management, in opposing bids, is motivated solely by self-interest as to suggest that takeover bids are always improper or dangerous to the interests of investors. It may be of interest to note that attempts to discourage shareholders from accepting tender offers take a variety of forms. Recently, in order to block a takeover bid, the management of one company hurriedly called a stockholders' meeting to obtain authorization to make a competing offer to buy its own shares

at a higher price. In another situation, after a tender offer was announced, management proposed a stock split and shareholders were led to believe, contrary to fact, that approval of the stock split was an alternative to accepting the tender offer. Frequently the takeover bidders, and management opposing a tender offer, resort to extensive newspaper advertisements, or other forms of communication, not subject to the explicit disclosure requirements of the securities laws, with the result that shareholders are inundated by a rash of charges and countercharges not easily, or in reasonable time, susceptible to control under the antifraud provisions of the statutes. The plain fact is that shareholders are not in a position to make informed decisions concerning the terms of the tender offer.

To meet this problem, the bills would require a person making a tender offer for more than 10 per cent of a company's securities to file a statement with the Commission disclosing his identity and background, his shareholdings in the company, the source and amount of the funds to be used and any loans he has made to obtain the funds, any plans he may have for major changes in the company's business, and any arrangements he may have with any other person with respect to the company's securities.

Consistent with the existing pattern where the takeover is subject to the proxy rules or registration provisions of the securities acts, the Commission would be given rule-making authority to require additional information in the statement, to prescribe the minimum information required in advertisements and to develop appropriate rules with respect to the techniques employed to make the statutory scheme effective. Thus, these provisions would assure that material information was effectively brought to the attention of shareholders and, in cases of opposition or competing tenders, would prevent certain types of high-pressure appeals and procedures possible when no restraints, other than the antifraud provisions of the securities laws, relate to these activities.

The procedures provided by the bills in the case of contested tender offers are analogous to those now followed when contending factions solicit proxies under the Commission's proxy rules. These rules, which were developed entirely from a simple delegation to the Commission of rule-making authority and responsibility, are under continuous scrutiny and review in the light of experience and are generally accepted as having been successful in providing adequate and accurate information to shareholders in contests for control of their companies. While there are obvious differences between tender offers and proxy contests, there is in both situations the common element of concern with the future management and control of the company. Adequate material information is equally important to a shareholder who is faced with a decision whether to sell his securities or retain his investment in the company. We believe that the bills provide a suitable framework for providing that information without unduly hindering tender offers which are or may be beneficial to the stockholders.

The second objective of these bills is to assure fair treatment of all shareholders who decide to accept a tender offer. Often takeover bids are made under circumstances which place undue pressure on shareholders to act hastily and to accept before management or any other group has an opportunity to present opposing arguments or competing offers. On occasion because of management's advice to its shareholders that their stock was worth more than the amount offered or as a result of competing offers, tender prices have been substantially increased.

In one instance, shares that had been deposited in response to a cash offer for \$36 a share on a first-come first-served basis were promptly taken up by the offeror, even after a second bid at \$50 a share had been made by another offeror. Furthermore, under existing circumstances, shareholders are not assured that all, or any, of their shares will be taken up if tendered.

The Senate bill contains three substantive provisions designed to assure that all stockholders who tender their shares are treated fairly. First, it provides that deposited securities may be withdrawn at any time during the first seven days after the date of the original offer, or at any time after 60 days from the date of the original offer, except as the Commission may otherwise prescribe. Second, it provides that where a greater number of shares are tendered than the offeror is willing to accept, the shares accepted must be taken pro rata from each stockholder in proportion to the securities deposited during the first ten days. Third, when the terms of an offer are changed to raise the price, the higher

price must be paid to all stockholders, including those who tendered before the price was increased.

While these provisions could have a salutary effect, we prefer the provisions of H.R. 14475 which are described in my summary statement.

During the hearings before the Senate Committee, there was discussion of the practice known as "short tendering." Where a tender offer is made with a provision for acceptance of tendered shares on a pro-rata basis, some persons tender more shares than they own in order to gain an advantage over ordinary investors. Thus, if it is estimated that only half of the tendered shares will actually be purchased by the offeror, a short tenderor will tender twice as many shares as he owns and thus sell all of his shares, while ordinary investors sell only half. As a practical matter, short tendering is largely confined to member firms of the stock exchange, since it is usually provided that stock certificates must accompany a tender unless a member firm or a bank guarantees that they will be delivered upon acceptance. In its report, the Senate Committee suggested that the Commission could deal with this practice under the fraud provisions of the Securities Exchange Act, and the Commission has done so by adopting Rule 10b-4, which, in effect, prohibits short tendering.

ACQUISITIONS OTHER THAN TENDER OFFERS

Not all acquisitions of substantial blocks of securities are made by means of tender offers. A corporation or individual—or a group of corporations or individuals—can acquire a substantial block of stock of a company through a program of purchases in the open market, or through privately-negotiated purchases from substantial stockholders, and thus achieve the power to influence the management and control of the corporation, without the other stockholders even becoming aware of this development.

Section 16(a) of the Exchange Act, which requires ownership reports from any holder of ten per cent of the equity securities of a company, does not fully meet the need of stockholders for information in this kind of situation. It requires only information concerning number of shares and type of ownership and does not give the public stockholders adequate information about the arrangements surrounding the acquisition or the purchaser's intentions with respect to the company.

The bills would require any person or group of persons, which acquires more than ten per cent of any class of equity security of a publicly-held company, to file with the Commission, and to send to the issuer and to any exchange on which the security is listed, within seven days after the acquisition, a statement containing certain specified information. This information would be similar to that required of a person proposing to make a tender offer and would include the background and identity of the purchaser, the source of its funds, the number of shares acquired, any contracts or arrangements with respect to the securities of the company, and any plans of the purchaser to make major changes in the company's business or corporate structure.

It must be emphasized again, that in establishing requirements which will make this important information available to stockholders, we must be careful not to tip the scales to favor either incumbent managements or those who would seek to oust them. We believe that the provisions of the bills reflect on appropriate balance among competing interests which, at the same time, will fulfill the need of public stockholders to be fully informed about the control and potential control of the company in which they have invested.

There is another problem in this area which is dealt with by the bills. Under Section 14 of the Act, when directors of a registered company are to be elected at a meeting of stockholders, we require that the stockholders be furnished with full information about the nominees, whether or not proxies are solicited and whether or not the nominees have previously been elected by the stockholders. However, when a "controlling" block of stock in one of these companies is sold, and the contract of sale provides (as it often does) that the seller will procure the resignations of all or a majority of the existing directors and their replacement by designees of the buyer, the other stockholders not only do not get a chance to vote on the new directors, they normally do not even hear about the changes until they have actually taken place.

This problem is dealt with in the bills which add a new Section 14(e) to the Act. Under this provision, if a majority of the directors of a company are to be replaced without a meeting of stockholders, pursuant to an arrangement with a person who is acquiring more than ten per cent of the stock of the company, then,

before the new directors take office, the issuer must file with the Commission and furnish to its stockholders information substantially equivalent to that which would be required if the new directors were being elected at a meeting of the stockholders.

CORPORATE REPURCHASES OF THEIR OWN SHARES

Another phenomenon of increasing importance is the growing tendency of corporations to repurchase their own securities. According to a recent study, corporations listed on the New York Stock Exchange spent more than \$1,300,000,000 during 1963 to purchase over 26,600,000 of their own shares. The amount expended for this purpose exceeded the amount of capital raised by these companies by selling new shares. An indication of the extent of the increase in the volume of corporate purchases of their own shares may be obtained by comparing the data for 1963 with the data for 1954, when the number of shares purchased by New York Stock Exchange listed companies was 5,800,000.

These purchases may be made for perfectly legitimate corporate purposes. A corporation may simply wish to reduce its outstanding capital stock, particularly when it has sold operating divisions or subsidiaries and has excess cash available. If the market price of its shares is less than book value or otherwise at a depressed level, the company's shares may be viewed by management as a good investment. Or the company may wish to have shares available for options, acquisitions or other purposes without increasing the total number of shares outstanding.

However, purchases by a corporation of its own shares can be used to affect the control of the corporation. The management may cause the corporation to repurchase shares for the purpose of preserving or improving the management's control position, or to counteract a tender offer or other takeover bid.

Whatever the purpose, such purchases may also have a significant effect on the market price of the shares. We have recently dealt, under existing antifraud provisions of the Exchange Act, with situations in which repurchases of shares were timed to increase the market price for such shares, while the company was negotiating to acquire other companies in exchange for such stock. In the case of one company, a repurchase program was actually used on a number of occasions to reduce the number of shares deliverable under existing contracts for acquisition of other companies.

But even where the management has no improper motive in repurchasing securities, substantial repurchase programs will inevitably affect market performance and price levels. That is why we believe that the rule-making authority contained in the bills would be a valuable adjunct to our authority under the existing antifraud provisions of the Act.

The provisions of the bills would make it unlawful for an issuer to purchase its own securities in contravention of rules or regulations which the Commission adopts because they are necessary or appropriate in the public interest, or to protect investors, irrespective of the question whether, or our ability to prove that, such activity is or may be fraudulent, deceptive or manipulative. The language, for this reason, is broader in its scope than presently applicable provisions of the Exchange Act.

The bills deal not only with purchases by the issuer itself but apply also to purchases by a parent or subsidiary of the issuer, or by a welfare or pension fund subject to the influence of the issuer's management. We have found that these give rise to similar problems.

Mr. COHEN. As the members of the committee are undoubtedly aware, one of the most striking economic and business developments in recent years has been the tremendous increase in corporate acquisitions and mergers. Every day, in the Wall Street Journal, and other publication of general circulation, one reads of two or three or more of these and often they involve the acquisition of corporations of substantial size and importance. One result of this trend has been the recent rise of the so-called "conglomerate corporation," which conducts numerous, separate and, most frequently, unrelated types of business.

Mr. KEITH. You have changed your statement there, Mr. Chairman.

Mr. COHEN. If I did it was inadvertent.

Mr. KEITH. You said in the statement "most frequently."

Mr. COHEN. That is true. I will correct my statement.

Mr. KEITH. And you corrected it by saying "very frequently."

Mr. COHEN. Well, I will change it back to "most frequently."

Mr. KEITH. I think it is of some importance.

Mr. COHEN. Yes, sir. A principal means by which these acquisitions are accomplished is the tender offer, or takeover bid, by which a corporation seeking to acquire another makes a public offer to purchase its shares. There are reasons for the popularity of tender offers. They are fairly obvious but if the committee will forgive me I would like to recite some of them anyway.

These may include speed, simplicity, and also—and of particular significance—the fact that, unlike a negotiated merger, the concurrence of existing management is not required and, unfortunately for the public interest, little or no disclosure is usually made. This contrasts with the two other principal methods by which control of a company is changed, the proxy contest and the negotiated merger or purchase of assets. In these situations, stockholders are required to vote and consequently the proxy rules apply and full disclosure is obtained. Where the 1933 act applies, of course, the registration statement contains information with respect at least to the efforts and identity of the offeror. As I will indicate later, there is a problem in that area. I might note incidentally, that this committee in 1964 wisely extended the scope of the proxy rules so that they now apply to practically all industrial corporations in which there is any significant public interest. In the tender offer, by contrast, there is no express provisions of law which requires any disclosure at all.

The offeror need not even disclose his identity, let alone his plans and purposes. Investors are therefore confronted with the necessity of making an important investment decision, the determination whether to sell their shares, or to keep them, without disclosure of material facts. The problem is compounded by the fact that the offeror usually wishes to bring all possible pressure on investors to decide quickly without reflection, and indeed without opportunity to consider relevant and material information.

The appeal is to get aboard the band wagon immediately or lose the opportunity to participate in what is made to appear an attractive offer. This situation is totally inconsistent with the basic philosophy of the Federal securities laws, as this committee has evolved them over the years in the Securities Act and the Securities Exchange Act, and in other statutes administered by the Commission, that investors should be furnished with full disclosure of material facts and given the opportunity to make a unhurried investment decision upon the basis of such disclosure. The purpose of the legislation before you is to remedy this situation.

The existence of a problem in this area has been recognized for some time. In the last Congress, and in particular on April 7, 1966, Chairman Staggers introduced H.R. 14417, a bill which was intended to accomplish essentially the same purpose as the bill before you today. Similar legislation was introduced in the Senate in that year. Such legislation, modified in the light of suggestions by various interested persons, was reintroduced in the current Congress and extensive hearings were held in the Senate Committee on Banking and Currency in the spring of 1967.

At those hearings, representatives of virtually every important organization in the securities field, including the New York Stock Exchange, which is represented here today, the American Stock Exchange, the National Association of Securities Dealers, and the Investment Bankers Association of America, appeared and testified in support of the legislation, although several of them had suggestions for changes, none, I believe, that affected the thrust or essential provisions of the bill. Following those hearings, the bill was unanimously reported out by the Senate committee and passed by the Senate on August 31, 1967.

At this point I would like to emphasize and reemphasize that the purpose of this bill, as the chairman indicated in his opening statement this morning, is a very simple one, solely to provide information to investors so that they can arrive at an informed investment decision. It is not designed to assist the offeror, nor designed to assist the management in resisting any plan put forward by the offeror. It is essentially based on the concept that the investor should have the information so that he can arrive at a decision. It would not involve the Government in any way in fashioning or effecting the terms of the offer, or of the arguments pro and con.

H.R. 14475, the other bill before you, differs from the Senate bill in certain respects. The following are the most significant: (1) Both bills require that a person making a tender offer, or otherwise proposing to acquire more than 10 percent of the outstanding stock of a company registered under the Securities Exchange Act, must file with the Commission a statement disclosing his identity together with certain information with respect to his financial arrangements and his purposes. Under the House bill, this statement must be filed with the Commission 5 days prior to the making of the tender offer, while under the Senate bill, the filing may be simultaneous with the tender offer. I think this change was made in response to suggestions made by the New York Stock Exchange. Their representatives are here today and I think they can explain their point of view on that.

We prefer, however, the provisions of the House bill, since this will give us an opportunity to examine the material and suggest any changes or corrections before it is disseminated to the public. If corrections are necessary after the material has been sent to the shareholders, this will not only be a source of embarrassment for the offeror but may also confuse the stockholders. We have come to this view after almost 35 years of experience under the proxy rules. Frequently proxy soliciting material filed by a contestant or by management may be, perhaps inadvertently but nevertheless may be, misleading—so misleading as to warrant correction. The Commission usually secures correction informally.

On occasion it is necessary to go to the courts but in either case, it is obvious what has happened and this frequently proves to be of embarrassment either to management or to the contestants in a way that perhaps affects the consideration of the issue by the shareholders on the merits. Incidentally, in a proxy contest the Commission's rules require that the material be filed within 10 days before the filing. The so-called 5 day provision is designed to serve the same purpose in that connection, without blowing the Commission's horn too loudly, it is generally conceded that the Commission's administration of the proxy

rules is a model of administrative regulation by rulemaking which has served the purposes of the economy well.

There are differences between the proxy contest rules and the takeover bill. There is no doubt about that and I think the representatives of the Stock Exchange plan to deal with them. Nevertheless, we believe that this requirement is important. It would place a burden on the Commission, quite frankly, but we are, nevertheless, willing to assume it because we believe it will serve best the interests of the shareholder.

The second major respect in which the Senate bill differs is that that bill exempts offers made by means of a registration statement under the Securities Act of 1933. I adverted to this earlier.

Registration under that act will be required if the offeror seeks to acquire securities in exchange for new securities of his own rather than for cash. And in recent months and in the past year this particular mode of tender offer has become more and more popular. The House bill contains no such exemption.

The exemption in the Senate bill was presumably based on the conclusion that registration under the Securities Act will provide full disclosure to investors. That is true as to one side of the equation.

The pending legislation, however, applies not only to solicitations on behalf of the offeror but also to solicitations in opposition to the offer. Such solicitations are commonly made by the management if they elect to contest the tender offer. Under both bills the use of false or misleading statements by anyone in such solicitations is prohibited. But the exemption for registered offerings would mean that, although the offeror would be limited in his solicitations by the disclosure requirements of the Securities Act, solicitations in opposition would be unregulated except to the extent that the general antifraud provisions of the securities laws might apply. I think that this inequality is unjustified.

There are many situations as to which it would be difficult to mount a case of fraud but, as this committee decided back in 1934 with respect to proxy solicitations, this type of industrial warfare, if I may use that expression, should be subject to affirmative requirements which would be developed by the Commission to implement this legislation even if the activities do not rise to the level of fraud.

Our experience in the past 2 or 3 years indicates that this is very important.

(3) Under the House bill, securities deposited pursuant to a tender offer may be withdrawn at any time until they are accepted by the offeror, subject to such terms and conditions as the Commission may prescribe, and if the offer is for less than all the outstanding securities, they will be required to be taken up pro rata rather than on a first-come-first-served basis, again subject to rulemaking power in the Commission. Under the Senate bill, securities deposited under a tender offer may be withdrawn only during the first 7 days or after the expiration of 60 days, and pro rata acceptance is required only during the first 10 days of the offer. We think the House bill provides additional protections for stockholders in this respect and that, in view of the almost infinite variety in the terms of most tender offers, which are limited only by the ingenuity of the offeror and his counsel, some flexibility through rulemaking is needed.

I would like to speak to the No. 4 item. The House bill applies to tender offers for the securities of closed end investment companies registered under the Investment Company Act of 1940. The Senate bill does not. We believe that this difference is merely an oversight for which we are, in part if not wholly, responsible. Both bills apply to securities registered under the Securities Exchange Act of 1934. In drafting this provision, the fact that closed end investment companies are exempt from registration under the Securities Exchange Act because they are subject to comparable, and indeed somewhat more detailed, disclosure requirements under the Investment Company Act of 1940 was overlooked. But there is no reason why shareholders of closed end investment companies should not enjoy the same protections to be provided by this legislation.

While, as I have indicated, we prefer the provisions of the House bill to those of the Senate bill, insofar as the two differ, we regard these points as of lesser significance compared with the importance of enacting this needed legislation at this session of Congress. If this committee accepts the Senate version, we believe we could live with it. If experience demonstrated that there were serious problems, we could and would come back to you.

In closing, I should like to point out that the need for this legislation has increased rather than diminished since the Senate acted last year. The pace of tender offers accelerates and we have received from numerous Members of Congress, many businessmen, lawyers, and State and local officials expressions of serious concern with respect to various takeover bids which have been attracting so much attention. Allegations of fraudulent or improper practice are frequent. In fact, they are usual, and litigation alleging fraud by one side or the other in a contested tender offer occurs almost weekly. It is almost standard operating procedure.

We have had to respond that we will investigate allegations of fraud to the extent that they fall within our jurisdiction, and indeed we have. But, owing to the time required for such investigations, it may be that the tender offer will be all over before the investigation is completed.

We have had difficulty in some situations in reaching a decision that we could mount a fraud case. While I would not like to convey the impression that enactment of this legislation would cure all of these problems, it would certainly help. If there were an orderly, supervised process of disclosure and if some ground rules were laid down, not only would investors be better protected but everyone would know where he stands.

I think I should add one further point which is found in my written statement. When we appeared before the Senate we referred to a practice which had developed, called short tendering, which resulted in some disadvantage to investors and substantial advantage to certain people in the securities business.

The Senate committee thought that this was a matter within the anti-fraud authority of the Commission and that the Commission should deal with it. We have. We have adopted a rule which deals with that problem.

Thank you, Mr. Chairman.

Mr. Moss. Thank you. I would like to ask just a few questions here. Has the Commission collected data regarding the number of character offers made within any recent given period.

Mr. COHEN. We don't have any statistics on any systematic basis but I did testify—and I think it has been accelerating since then—that in 1960 the aggregate of cash tender offers was less than \$200 million if I remember correctly, and that in 1965 it was almost \$1 billion. The pace since 1965, in 1966, 1967, and 1968, has quickened. This is an aspect of a situation that apparently is going on all over the world.

Unfortunately, we don't have the tools to deal with them whereas other countries of the world have developed tools. By way of interest, in England they first began to deal with this problem some 7 years ago on a voluntary basis. They have since revised the rules three times. The rules they have today are pretty tough rules. The rules have been in effect only 2 or 3 months and on my recent visit to Europe I discussed them with the chairman of a special panel that was created to administer these rules. It appeared to me that voluntary compliance with such a code will probably not last very long. Only this past week, in a case involving one of the largest companies in Great Britain, there has arisen a problem which indicates some difficulties with this voluntary arrangement. It relates to Courtald's attempt at a takeover bid for International Paints and there is quite a bit of stew about it.

In fact, the chairman of that outfit has since suggested that there be created in Great Britain an SEC to administer the takeover rules and other matters. I was leading up to that, Mr. Chairman.

Mr. Moss. Well, to the extent that you have the data on the number of tender offers, do you have anything showing how many of the transactions have been consummated?

Mr. COHEN. I can't answer that question at this moment. We can supply that for the record to the extent we have it, but I must say we have not collected information of that kind since no filing requirement now exists. I think that recent times have demonstrated that many offers are made and they are very frequently frustrated by another offer which may be more pleasing to or arranged by the management. Very often this results in a situation where the shareholder may be faced with two or three different kinds of offers, some cash, some partly cash and securities, some in securities and sometimes securities of several kinds. The ordinary problem that an investor faces in determining whether to buy or sell a security is multiplied manifold.

So far as your question with respect to success is concerned, a great many of them are successful, but more and more of them are not successful principally because management has opposed them. There is no regulation of the manner in which management does this. I am not suggesting that there is anything wrong with such activities by management but they have brought onto the scene other offerors with the result that the investor, because he is forced to tender promptly in order to take advantage of certain provisions of the offer, is faced frequently with an impossible situation in terms of determining which is in his best interest.

This is true not only of the investor but of the person who advises him. But we will, if the chairman wishes, submit such information as we have compiled. But I am afraid we don't have any systematic information

(The information requested follows:)

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., July 1, 1968.

HON. JOHN E. MOSS,
*Chairman, Subcommittee on Commerce and Finance, Committee on Interstate
and Foreign Commerce, House of Representatives, Washington, D.C.*

DEAR MR. MOSS: As I indicated to you at the hearing on H.R. 14475 and S. 510 this morning, persons making cash tender offers are not required to file any statements with the Commission. After a review of our records, I find that we have no information on the total number of tender offers made during any recent period, on the spread between the tender prices and the market prices at the time the offers were made, on the number of offers which were successful during any recent period, or on the number of persons who made tender offers and thereafter sold their holdings to persons making counter offers.

As far as we are aware, the study by Professors Samuel L. Hayes III and Russell A. Taussig, published in the April 1967 issue of the Harvard Business Review and included as Appendix 2 to the Senate hearings on S. 510, covering the period from January 1, 1965 to December 31, 1966, contains the most complete compilation of information currently available concerning cash and stock tender offers. We know of no comparable compilation of data for more recent periods.

Sincerely,

MANUEL F. COHEN, *Chairman.*

Mr. Moss. Do you have any data showing the price at which the acquiring person is ready to accept tenders? If so, what is the spread between this price and the quoted market price?

Mr. COHEN. I don't have any specific information. I am sorry to sound so disorganized in this area, but we just don't have the information since there is no requirement that we be informed. But experience indicates that the price offered is usually a substantial premium over the market price, and this has been pointed to as enough to satisfy any shareholder. The problem that I have with that argument is that if someone is willing to pay, let's assume, 5 percent more than the market price, obviously he thinks it is worth more than 5 percent or else he would not offer it; and offers are made for a variety of reasons. I should go back a minute. Very often these offers are not for all of the shares. Therefore, a shareholder has a number of questions to decide:

One, does he want to remain with the company under the new and inspiring leadership which is sometimes offered; two, does he think that, in any event, even if he tenders all of his shares and they are not all taken he is going to continue as a member of that company. This raises the question whether he should sell his shares in the market which sometimes adjusts to these offers. Thirdly, he is not in a position to make the kind of analysis as among competing offers that he needs to make.

It is for all of these reasons that I think this bill, which would provide the Commission with a modicum of rulemaking authority, would permit us to develop appropriate rules.

If I may again go back to the analogy of the proxy rules, it should be recalled that we do have an elaborate scheme of proxy regulation which springs from a single sentence in the 1934 act, which, paraphrased in very plebian terms, merely says: "Mr. Commissioner, please adopt a scheme of regulation in the public interest."

Now, since we first started in this area we have had seven major revisions of the proxy rules with the assistance and cooperation of industry generally, the securities industry in particular and of the bar associations and other interested groups. I am repeating myself, but I

think it is accepted as being a model of a disclosure scheme. This is an area, this area of industrial warfare—based on my own experience I can say this—an area in which the greatest ingenuity has always been employed. The Government's ingenuity is frequently no match for it and there is a lag. I must confess that. But we do catch on after while and adopt the appropriate regulation to deal with the problems—at least the major problems.

Mr. Moss. Do you have any data which would show in the case of transactions which are not completed how many of the share tenders were actually accepted and, is there any information as to whether the acquiring person during the course of receiving these tenders may have unloaded shares that he possessed prior to making this offer?

Mr. COHEN. We don't have any systematic information, but we do have some information in particular that the last item may have occurred. We have such a situation under investigation. I would rather not speak further to it. This is an area where darkness very often serves the purposes of many, but certainly, not that of the investor.

Mr. Moss. As long as you have the matter under investigation—

Mr. COHEN. There have been other situations, Mr. Chairman, which you may have in mind.

There has been enough experience in the past 2 years for any sophisticated takeover bidder to know that, unless management joins him, management will seek another partner and that other partner probably will make a slightly better offer. We have the feeling that many of these people are doing it for the short-term gain, or, to use the vernacular, to make a fast buck. We have a number of variants of that. We have a situation where almost overnight particular individual or company made several millions of dollars in a situation of this kind.

We have the feeling that some of these offers are made only to initiate that activity.

Now, there is one thing about that.

Mr. Moss. I was going to ask you that. Has this device been used in your judgment for the sole purpose of pushing it up?

Mr. COHEN. I can say that I think it has been, but I cannot say that we have a case in which we have proven it. I think there has been a good deal of discussion of this in the newspapers and I think the newspaper people, who are frequently very sophisticated about these matters, think so. I believe it has happened. We have had other kinds of problems. In fact, there is one which occurred recently where there is a question which has been raised about whether or not some of the profit, if not all of it, may be subject to some recovery action by the company involved.

Mr. Moss. There again you anticipate a question. I was going to ask whether there should be some kind of mechanism provided for this type of manipulation to be made unprofitable, that is the profit be recapturable by the corporation, or, in the absence of a suit, by the corporation or its stockholders by the Commission.

In this connection I think we should take note of the recent transactions of Crane Co. and the proposed acquisition of control of Westinghouse Air Brake Co. When this failed Crane sold its holdings for around \$75 million and presumably made a profit of some \$5 million to \$10 million, and I have a series of recent press clippings, which I am

going to ask unanimous consent to be made a part of the record at this point, which illustrate a series of cases where this appears to have happened.

(The documents referred to follow:)

[From the Wall Street Journal, May 16, 1968]

TOM EVANS' TAKE-OVERS BUILD A VAST FORTUNE, STIR HOT CONTROVERSY
CRANE, PORTER FIRMS GROW AMID EXECUTIVE TURMOIL; KEY VOTE AT WABCO TODAY

Make Profits Quick—Or Else

(By John Barnett)

PITTSBURGH.—Thomas Mellon Evans grows suddenly solemn as he discusses his latest corporate battle. "Talk about business ethics," he says. "I've never seen anything to match the unethical way that damn Westinghouse Air Brake outfit operates."

Executives of Westinghouse Air Brake Co. (Wabco) retort, in effect: Look who's talking about ethics. In a court brief, company lawyers have described Mr. Evans' original offer to purchase Wabco stock, in exchange for debentures of Crane Co., of which he is chairman, as an attempt to pull off a "dishonest swindle."

That exchange is a fair sample of the acrimonious nature of the battle for Wabco (1967 sales: \$305 million), which heads for a key stockholder vote today. It's also typical of the fierce controversy that Tom Evans now 57, seems to create almost as naturally as he makes money.

Over the last three decades, Mr. Evans has been embroiled in battles for control of many companies. In nearly all, he has been cast in the unpopular role of a bumptious outsider trying to bull his way past a reluctant management.

Moreover, Mr. Evans has become something of a legend for his tough methods of operating a company once he wins control. He demands prompt profit performance from both assets and men, if he doesn't get it, he sells the assets or fires the men. Some sample reactions to these methods: Pickets marched outside the 1959 Crane Co. annual meeting, at which Mr. Evans was elected chairman, carrying signs berating: "Money-Mad Evans." And at the Evans-run H. K. Porter Co., a favorite quip defines an optimist as a Porter executive who brings his lunch to work.

Tom Evans' methods, however, have enabled him to build not one but three business empires. Besides his brokerage firm, he runs Crane, a maker of plumbing and heating supplies with 1967 sales of \$403 million, and Porter, a Pittsburgh-based conglomerate with 1967 sales of \$280 million, as entirely separate companies; the other concerns he has won control of have been merged into these firms. Besides being chairman of both concerns, he owns 15% of Crane's outstanding common stock and 67% of Porter's.

Mr. Evans formed the brokerage house, Evans & Co., 11 years ago to save brokerage fees on his extensive stock deals. Through it, he, his wife and three grown sons have made personal investments in scores of companies he doesn't control—at least not yet. Altogether, starting with little more than an inheritance of about \$15,000 (despite his middle name being Mellon), he has amassed a personal fortune estimated at \$80 million to \$100 million.

The Wabco Fight

Now Mr. Evans is seeking to merge Crane and Wabco, an old Pittsburgh-based concern that, besides air brakes, makes railway switch gear, train-control systems, earthmoving equipment and mining machinery. (It and Westinghouse Electric Co. were both founded by George Westinghouse, inventor of the air brake, but there is no connection today between the two Westinghouse concerns.) Meeting bitter resistance from management, he has sought to have Crane acquire enough Wabco common stock to force a combination. At first he attempted to obtain this stock through cash purchases by Crane. Then he turned to the Crane-debentures-for-Wabco-common offer, which has been extended three times; it now expires May 24. Mr. Evans says that as of Tuesday Crane owned nearly 31% of Wabco's common.

Wabco management's response has been to accept a merger offer from American Standard Inc., Crane's chief rival in the plumbing-fixtures field. Wabco stockholders vote today on this proposal, but whichever way this ballot goes, the

outcome of the fight probably will not be definitely known until several lawsuits concerning the battle are decided.

Mr. Evans contends Wabco management acted unethically by turning down Crane's merger proposal after insufficient consideration and then turning to American Standard before Crane had enough time to come up with a better offer. Wabco management replies that Mr. Evans sought to pull off a "dishonest swindle" by trying to induce Wabco shareholders to exchange their common stock, which carried an ownership interest in the company, for Crane debentures that would have given them no ownership interest in the merged concern (Crane later modified the proposal to make the debentures it is offering partially convertible into Crane common stock).

Getting Personal

As happens frequently in an Evans fight, the battle has gotten into personalities. A. King McCord, Wabco chairman, has accused Mr. Evans of offering him "inappropriate" financial inducements, including stock options in a merged company, in an effort to win his backing for combination with Crane. "I was shocked" at this offer, he says.

Mr. Evans, in reply, tells an inquirer with a chuckle that he sees nothing wrong with the offer—except that, since Mr. McCord rejected it, "I guess it wasn't inappropriate enough, wouldn't you say?"

The mixture of banter and bluntness in that reply is indicative of the personality that makes Mr. Evans so controversial. To an interviewer, he seems a curious blend of boyish enthusiasm and steely calculation. He is a stocky, nervously active man of medium height whose round face is habitually twisted into a grin—sometimes apparently out of simple good humor, sometimes in obvious relish over victory in a business deal.

Friends find him a pleasant and even charming social companion, whose seemingly boundless energy can be engaged by a discussion of politics or early American art as well as by business. He delights in showing a visitor the 19th-century prints of New York scenes that decorate his Park Avenue office in that city, and he confides that although he is a lifelong Republican—he was a Taft-pledged delegate to the Republican National Convention in 1952—he has contributed money this year to Senator Eugene McCarthy's campaign for the Democratic nomination because he thinks the U.S. involvement in Vietnam is "immoral."

But his best friends concede that this chatty acquaintance becomes a very different person in business deals. An associate who describes Mr. Evans as "quite shy and proper on the personal side" says that "on the business side he's extremely bellicose—rough, hard-driving, a tough guy." George Moore, chairman of First National City Bank of New York, puts it this way: "Tom Evans is a tough, realistic, competent businessman whom you don't want to run afoul of unless you know precisely where all the aces are."

Former Aide's View

To many of his employees, Mr. Evans seems a shouting tyrant whose wrath is apt to erupt at any time. A confrontation with him can be a nerve-shattering experience for a subordinate, says one former Porter executive: "He'll call somebody a dumb bastard or an ignorant son of a bitch, and the guy has no choice but to put up with it—until he can find another job."

In any case, friends, adversaries and employes agree on two traits, Mr. Evans shows to everyone. He is blunt—to the point of creating problems for himself says one associate: "Sometimes I think he needs a personal public-relations counselor." And he has displayed uncommon determination in taking over companies; some 43 have been absorbed into H. K. Porter alone in the last 19 years, many over the resistance of their managements, and nearly all have been profoundly transformed under his stern make-money-quick-or-else demands.

Though, like the Mellons, he comes from Pittsburgh, Mr. Evans is only distantly related to the banking family whose money launched Mellon National Bank & Trust Co., Gulf Oil Corp., Aluminum Co. of America and other giant concerns. (In the Wabco fight, in fact, four company directors associated with Mellon Bank are among his opponents; he refers to one, the bank's chairman, as "my ex-friend Johnny Mayer," and he has had Crane Co. take \$2 million in deposits out of the bank.) After graduating from Yale in 1931, he began his career inconspicuously as a clerk in the chairman's office at Gulf Oil.

An Early Conglomerate

He made some money investing in Gulf Oil stock, and in the mid-1930s began investing those profits and his inheritance—pocket money, by Mellon-family standards—in bonds of H. K. Porter, then a troubled maker of steam locomotives. Because Porter had defaulted in paying interest on the bonds, he was able to pick up those securities for as little as 10 cents per dollar of face value. Result: When creditors threw the company into bankruptcy proceedings, Mr. Evans emerged as the major bondholder, with enough bargaining power to come out of a court-supervised reorganization as Porter's 29-year-old president—over the objections of several older directors.

World War II helped Porter to recover, bringing profits to a subsidiary producing artillery shells. By 1948, though, it was still recording sales of only \$11 million a year. At that point, Mr. Evans decided to diversify, and in succeeding years he built Porter into the kind of company that is now called a conglomerate. As the locomotive business was phased out, acquisitions pushed the company into production of steel, industrial rubber products, electrical equipment, hardware, paint and refractory brick.

By 1959, Mr. Evans was ready to undertake a new venture. He bought a substantial block of Crane Co. stock as a personal investment. He then hired Alfons Landa, the most feared proxy fighter of the day, as his lawyer and confronted Crane management with a demand that he be made chairman. After a stormy, but brief, battle, he won—and began a transformation somewhat similar to the one he had carried out at Porter. Since he took over, Crane has acquired 30 companies, though it hasn't diversified quite so widely as Porter; it has tended to stick to meters, valves, purification gear and other devices in the "fluid-control" field.

The methods by which he has expanded both companies have generated fierce controversy. To avoid diluting the equity of shareholders (meaning, at Porter, chiefly himself), he has always insisted on making acquisitions for cash rather than by issuing stock. To get the cash, he has sold less profitable assets (including, at Crane, most of the company's once-extensive warehouse system), held inventories to a minimum and insisted on a prompt profit return from any capital investment. He is frank in stating that he also has held down spending on research and new-product development. "When we develop a new product from scratch," he says, "its because we can't buy somebody who already makes it."

Reply to Criticism

All this has given him a reputation for ruthless willingness to liquidate plants and fire workers wholesale if he can see a financial gain in doing so. Friends say he is sensitive to such criticism and regards it as unjust. Mr. Evans himself says only that rapid expansion of Porter and Crane was possible because "there were a lot of badly run companies that we could buy cheap" and that "some of these companies gave us a lot of trouble" after acquisition.

In any case, Mr. Evans' companies are still using the same methods. In July 1966, for instance, Crane bought Glenfield & Kennedy Holdings Ltd., a British concern that makes water purification equipment and that D. C. Fabiani, Crane president, says was on the verge of bankruptcy at the time of acquisition.

"After we took over, there were a lot of firings," says Mr. Fabiani. "It involved cutting the payroll very substantially because a lot of people had been kept on with nothing to do." By October 1966, three months after acquisition, he says, the company was breaking even, and by the end of the year it was making a profit.

Mr. Evans' methods as an operating boss—and, in particular, his relations with subordinates—also stir much dispute. Several Crane vice presidents were fired immediately after he became chairman, and around Pittsburgh businessmen speak of the executive turnover at H. K. Porter with awe. Only three of the eight division general managers listed in the 1963 annual report are still with the company; some of the others have been replaced not once but several times in the intervening five years. At lower levels, the turnover is said to be even more rapid.

To be sure, many executives leave of their own accord or are lured away. Mr. Evans has a policy of hiring relatively young men for such responsible jobs as division general manager or sales manager; executive recruiters frequently go after such men after they've had a bit of seasoning in what has been referred to as "the Evans School of Business." One former Porter executive is said to have kept two telephones in his office—one for regular business purposes, the other, a private line, for calls from recruiters.

But Porter doesn't deny that many executives are simply fired, abruptly and without apology, because they don't meet Mr. Evans' exacting standards for profit performance. "We are totally ruthless with people who can't handle the job," says J. Stuart Morrow, president.

The executives who last are handsomely rewarded. B. Campbell Blake, vice president and general manager of Porter's Connors Steel division, last year drew \$195,556 in salary and incentive bonuses—nearly twice the \$100,000 salary Mr. Evans himself took from Porter.

But though the pay can be high, the pressure from Mr. Evans is constant and intense, those who have worked for him say. Some contend it occasionally backfires, too.

When a general manager discovers he can't turn a profit as fast as he's supposed to, he starts looking for another method," says one former Porter executive. "He can fudge his figures, but he knows Evans is sharp and that won't work long. So he has to find something else." He implies this creates a temptation to cut corners on product quality as a method of improving profit margins.

Several sources offer such an explanation for the troubles of BPS paint, a product line that Porter acquired in 1960 but sold in 1964 after the paint had acquired a reputation for uneven quality. Mr. Evans grins ruefully when this product is mentioned. "That was one of my mistakes," he says. He concedes Porter lost money on the paint operation—but adds that it got some tax benefits from selling the line.

Overall, the profit performance of Mr. Evans' companies recently has been somewhat uneven. Porter's net income hit an all-time high of \$7.4 million in 1966 but dropped last year to \$4.3 million, its lowest net since 1961. Crane has done somewhat better; though its 1967 profit was down to \$10.2 million, from \$11.3 million in 1966, earnings for the two years taken together represent a substantial improvement from the early 1960s, when it and other plumbing-fixture makers went through a deep profit slump.

On the Move

Mr. Evans runs Crane somewhat less closely than he does Porter; he leaves much of Crane's day-to-day operation to President Fabiani. But he still keeps a close eye on both companies. He logs about 100,000 miles a year in business flights around the country in his personal four-engine jet ("That doesn't include the fun trips to Europe or South America," he says), visiting companies he is thinking of having one or the other concern buy or dropping in on the 100-odd Crane and Porter plants.

On such visits, Mr. Evans probes into small details; he has a penchant for reading salesmen's call reports and checking up on direct-mail advertising operations. "He makes no effort to follow the chain of command," adds Porter President Morrow. "He will walk through a plant and tell a foreman what to do, even though the plant manager may be standing right next to him." But, Mr. Morrow says philosophically, "It's his company, and he can run it any damn way he wants."

Even sitting in his office on Park Avenue, Mr. Evans puts on a show of the energy that admirers say is his greatest executive talent—and that leaves a visiting reporter dazed. He twists and turns restlessly in his chair, his eyes darting occasionally to a closed-circuit television screen opposite his desk that flashes a constant flow of stock quotes piped in from the adjacent offices of Evans & Co. And, during the one-hour interview, he conducts this business:

A chat with Crane Co. vice president and controller James O'Brien, who reports some figures on the Crane-Wabco fight.

A discussion with son Ned of Ned's efforts to buy a Massachusetts apartment building as a personal investment for his father.

A discussion with Crane President Fabiani of merger talks Mr. Fabiani is conducting with executives of a boiler-making company in an office across the hall.

A brief personal visit to those merger talks.

A telephone call to George Champion, chairman of Chase Manhattan Bank and a director of Travelers Insurance Co., to ask his help in getting Travelers to abstain from voting its sizable block of Wabco shares against Crane ("Say, George," Mr. Evans begins the conversation, "you probably know we're having a problem with this damn Westinghouse Air Brake").

Another phone call to a mutual fund executive to set up an appointment to try to persuade him to sell the fund's stock in American Standard, Crane's rival

in the fight to take over Wabco, and buy Crane debentures instead ("I'd like to come up and show you some figures on a better investment than that turkey," Mr. Evans says).

Between these conversations, Mr. Evans remarks that if he had known the Wabco fight "would be this much damn trouble, I would never have got involved." But one of his aides questions this assertion. Despite the acrimony of the battle, the aide says, "I would guess that Tom Evans is having more fun than he's had in a long time."

[From the Wall Street Journal, June 14, 1968]

CRANE'S INTEREST IN AMERICAN STANDARD SOLD

BATTLE FOR WESTINGHOUSE AIR ENDS WITH LARGEST BLOCK SALE ON BIG BOARD RECORDS

Trade Amounts to \$76 Million

NEW YORK.—The spectacular six-month fight of Crane Co. for control of Westinghouse Air Brake Co. ended yesterday in an appropriately dramatic fashion as Crane sold its block of 730,312 shares of American Standard Inc. preferred stock for \$76 million.

The transaction, in dollar value, represented the largest single-block trade on the records of the New York Stock Exchange. It also effectively ended a corporate battle that has produced a series of verbal and legal fireworks.

The winner of the struggle was American Standard, the aggressively expanding plumbing-supply maker that last week successfully consummated its acquisition of Westinghouse Air Brake. While Crane Co. lost out, it was left with what it thinks will be a rather healthy consolation prize—a substantial, but as yet unspecified profit on its investment in Westinghouse Air Brake.

Thomas Mellon Evans, Crane's chairman, acknowledged Crane's sale of the American Standard preferred stock shortly after sale of the huge block appeared on the stock exchange tape. Asked why Crane had sold, he replied simply, "Oh, we thought we might as well let it go." Crane had received the American Standard preferred in exchange for its holdings of 31% of the outstanding common stock of Westinghouse Air Brake.

Blyth Handles Sale

Ironically, the Crane transaction was handled by Blyth & Co., the underwriters that helped American Standard obtain proxies in its battle with Crane. Crane had sued both American Standard and Blyth to bar them from voting certain shares, but the suits were dismissed. American Standard said yesterday that the preferred stock was purchased by several private and institutional investors. None of the buyers was named.

The question of how much of its profit from the sale Crane will be able to keep probably won't be resolved until after litigation, Mr. Evans stated. He said that the "majority" of the Westinghouse Air Brake stock had been purchased more than six months ago, and that "there's no question" Crane will get the profit from these shares. As for the stock kept less than six months, Mr. Evans said that "we think we can keep the profits" but that the question "might have to be settled by litigation."

Because Crane owned more than 10% of Westinghouse Air Brake, Crane qualified as a corporate "insider." Insiders who sell their stock within six months after purchase must return the profit to the issuing corporation.

Involuntary Exchange

The question is complicated, however, by the fact that Crane exchanged its Westinghouse Air Brake stock for American Standard preferred rather than selling it outright. Mr. Evans also notes that the action was involuntary as Crane voted against the merger.

Mr. Evans declined to estimate how much of the \$76 million sale price represented Crane's profit. He said only that it was "fairly substantial but nothing tremendous."

Yesterday, on the New York Stock Exchange, Crane Co. closed at \$48.50, off 25 cents, while American Standard dropped 75 cents to \$37.75. American Standard's new \$4.75 convertible preference stock, which Crane sold at \$104.25, closed as the most active stock at \$106, up \$1.75, on a volume of 782,100 shares.

Crane's \$76 million transaction was the largest single block trade in dollar volume by a large margin. The previous record holder was 1,153,700 shares of Alcan Aluminium Ltd. valued at about \$26.5 million last Oct. 31. The American Standard preferred block is the third largest in terms of share volume.

Crane's Key Card

Crane's holding of the large Westinghouse Air Brake block became its key card after a Federal judge two weeks ago dismissed Crane's attempt to invalidate proxies voted in favor of the merger with American Standard. In exchange for its Westinghouse Air Brake holdings, Crane received a block of American Standard preferred stock convertible into almost two million shares of the company's common. Thus, even after complete conversion of the preferred issue, Crane could have owned 11% of the outstanding common stock of American Standard its largest competitor in the plumbing-supply field.

The antitrust implications of this situation drew inquiries from the Justice Department. Presumably, Crane had hoped the department would move to block the American Standard-Westinghouse Air Brake merger and eliminate the antitrust problem. But American Standard was contemplating eliminating it in another way—by filing suit to force Crane to divest itself of its American Standard holdings.

One Crane suit against the merger still remains pending in Federal court in Pittsburgh. Mr. Evans said yesterday Crane hadn't decided whether to drop the court action.

[From the New York Times, June 14, 1968]

MARKET PLACE: TOES BRUISED IN GIANT TRADE

(By Robert Metz)

What more fitting day for it to happen? The same day the Big Board tore up the record book as volume pushed through the roof to 21.35 million shares, brokers put together the biggest deal in the history of the exchange.

There was competitive spirit and flamboyance in abundance surrounding the transaction and not a few toes were bruised at Walter Frank's post on the floor where 730,312 shares of American Standard preferred stock sold in a single massive trade for \$76 million.

The biggest previous trade was almost puny by comparison. While more shares were involved then—1,153,700—those Alcan Aluminum ducats were valued at just \$26,535,100 last October. So yesterday's deal was nearly three times as big.

Tied up in the tidy \$76 million was a profit estimated at \$9 million for the Crane Company which got the 4.75 percent preferred shares after the company's ardently sought bride, Westinghouse Air Brake, merged instead with American Standard, the rival plumbing company.

Thomas Mellon Evans, the colorful man behind Crane's attempted take-over of Wabco, evidently paid \$65.88 million in cash and securities and perhaps \$2 million more for expenses to establish his position in the Pittsburgh industrial giant. He still owns about 10,000 of the American Standard preferred shares which closed yesterday well above the 104¼ he got for them—specifically at 106, up 1¾.

But informed Wall Street sources were guessing that Mr. Evans would be challenged for his profits. American Standard would not comment as to whether it intended to battle for return of the profits, but others with a grasp of the situation did. One legal expert said that as an insider—an owner of more than 10 percent of Wabco's shares—Crane would have to return all the profits to American Standard.

On the other hand, there was a "question of law as to whether profits on all the shares or just on those in excess of 10 percent would have to be returned. If the court ruled that the first 10 percent was exempt from the insider rule, Crane Company would have \$5 million in profits. If not, Crane would get nothing for its efforts.

Meanwhile, back on the floor there was at least one company that evidently thought it had been setting up the biggest cross in history. The firm—Tyne, Kendall & Hollister—hoped to make the commissions on both the buy and sell sides. No comment came from Tyne, Kendall.

In fact, Blyth got the seller's commissions. Tyne, Kendall shared the buyer's commissions with Salomon Brothers & Hutzler, and, to a smaller extent, with Blyth.

Wall Street sources said, Tyne, Kendall had been "up night and day working on the deal since the beginning of last week" and thought it was theirs.

The firm reportedly found out during actual negotiations on the floor that the pie was being sliced into several pieces. The floor discussion lacked some of the diplomatic niceties—or so an observer said. "It was certainly not a nursery school tea party," he commented. There was a lot to fight over. The commissions totaled \$750,000—half on the buy side and half on the sell.

[From the Wall Street Journal, June 17, 1968]

AMERICAN STANDARD SET TO SUE CRANE, ASKING FOR RETURN OF PROFIT
GAIN CAME ON CRANE'S DISPOSAL OF STOCK RECEIVED IN RETURN FOR WESTINGHOUSE
AIR HOLDING

NEW YORK.—American Standard Inc. plans to sue Crane Co. this week, asking for the return of Crane's profit on the disposal of its holding of Westinghouse Air Brake Co. stock, William D. Eberle, president of American Standard, said in an interview.

Last Thursday, Crane sold a block of 730,312 shares of American Standard \$4.75 convertible preference stock for \$76 million, the largest single-block trade in dollar value in history on the New York Stock Exchange. Crane had received the stock in exchange for its holding of 31% of the outstanding common stock of Westinghouse Air Brake, which has merged into American Standard.

Because Crane owned more than 10% of Westinghouse Air it qualified as a corporate insider. Insiders who sell their stock within six months after purchase must return the profit to the issuing corporation.

However, the Crane transaction is complicated by several questions: Can the company keep its profit on the portion of Westinghouse Air Stock bought more than six months before the merger? Can it keep all its profit because it exchanged Westinghouse Air for American Standard preferred rather than selling it? Can it keep the profit on the shares it bought before it had acquired a 10% interest and become an insider?

Mr. Eberle said the questions didn't have any clear answers and that "probably the only way it can be clarified is through court action."

Thomas Mellon Evans, chairman of Crane, declined to say how much profit the company actually made. But he said a published figure of \$9 million was too high.

According to Mr. Eberle, court testimony showed that Crane paid slightly less than \$66 million for its Westinghouse Air holdings. But Crane's additional expenses—including the cost of selling, brokerage fees, and financing costs are an unknown factor, he stated. "Their profit could be anything from nothing to \$9 million," Mr. Eberle said.

In another area, Mr. Eberle predicted that the acquisition of Westinghouse Air Brake would add 15 cents a share to American Standard's net income this year. But he said he felt that Wabco in future years could do at least as well as its record \$16.8 million earnings in 1966, which would have added more than 50 cents to American Standard's net.

American Standard manufactures plumbing and heating supplies and, through its Mosler Safe division, security equipment. Westinghouse Air Brake is a Pittsburgh-based producer of braking equipment, railway signal and control gear, heavy equipment for construction and mining, and electronic gear for defense uses.

Mr. Eberle said Westinghouse Air's earnings would be consolidated with American Standard's for the second quarter on a pooling-of-interest basis.

The American Standard executive, who has pledged to embark on a diversification program that will produce sales of \$2 billion in 10 years and lessen the company's dependence on housing, said sales this year, including Westinghouse Air, should approach \$1 billion, with only about 60% tied to the housing market.

Mr. Eberle said he couldn't precisely project American Standard's 1968 earnings because "the whole last half of the year is up in the air" due to uncertainties over taxes and interest rates. He said, however, that he still is sticking with his forecast six months ago of 1968 net somewhere in the area of \$1.70 a share.

Speaking about plans for Westinghouse Air Brake, Mr. Eberle said there wouldn't be any major changes of management with one exception: The retirement of Chairman A. King McCord next spring when he reaches age 65. Mr. McCord's successor, Mr. Eberle stated, will come from within the company. The most likely candidate is considered to be Lawrence W. Walkley, Westinghouse Air president.

Mr. COHEN. Those press clippings, Mr. Chairman, have given rise to my personal feeling—I don't know that I am prepared to speak for the Commission only because we have not sat down to evolve an official position, but I think all of my colleagues share my view—that many of these offers are made in order to achieve a short-term profit on this basis.

Now, that particular situation to which you referred involving Crane may become the subject of some litigation in which the Commission may or may not be involved and for that reason alone I would prefer not to speak to it, but I think the clippings indicate that the parties involved were not unaware of the possibilities.

To answer your question specifically, we do have antimanipulative authority under the statute. I am not sure that there is any real lack in this area.

I think that this bill, which will provide the Commission with the right to develop affirmative rules which are not necessarily antifraud, will serve to obviate many of these situations that might otherwise occur.

The second part of your question related to our right to seek recovery. The statute provides that any officer or director and any person who owns more than 10 percent of the shares of any equity stock of a listed company, and of certain other companies, who makes a profit in the purchase and sale or sale and purchase of stock of that company within a 6-month period, is subject to suit at the hands of the company, or by a shareholder on behalf of the company.

Now, that perhaps is not as complete a remedy for some of the takeover situation to which you have referred because some of them are made by persons who either were not more than 10 percent holders at the time of the acquisition or perhaps never quite reached that point but who nevertheless are engaged in this form of short-term trading. This is an area that merits attention by the Commission and by the committee. Indeed, I have an unanswered letter from a member of the committee which relates to that problem.

(For further information subsequently submitted, see letter dated July 9, 1968, p. 75.)

Mr. Moss. Now, Mr. Chairman, I have one last question.

The Federal Reserve Board has written expressing its support in general for the legislation but objects to the exemption from disclosing the financial arrangement where funds are provided by means of a loan made in the ordinary course of business by a bank.

The Board says that it is not aware of any reason why the same disclosure requirements should not apply to banks as to other lenders. The Board accordingly recommends the deletion of the exception which starts on page 2, line 22, of S. 510 and continues through line 25.

In the alternative the suggestion of confidential treatment is made. My question is what is your opinion with regard to this matter?

Mr. COHEN. First, let me say, Mr. Chairman, that I have never been in any disagreement with the Federal Reserve Board, certainly not publicly. Nor have I ever placed myself in the position of being for sin or against virtue. Quite obviously the suggestion of the Federal Reserve Board is not only a meritorious one but one which should receive very careful consideration.

I would like to explain how the exemption got there and perhaps that may in part answer your question and if it does not I will answer your question directly on my own behalf.

The provision was put in there because it was felt that if the names of the banks were disclosed economic pressures being what they are in our real world that this might make it difficult for either management or someone who wishes to make a takeover bid to acquire the necessary financing in a perfectly legitimate arrangement.

I think the proposal of the Federal Reserve Board, as you read it, meets that problem directly and on that basis the Commission I am sure, although I cannot speak for the Commission because it is the first I have heard of this particular suggestion, would have no objection to an amendment of the bill along the lines suggested by the Federal Reserve Board.

Mr. MOSS. I ask unanimous consent to place in the record a letter from the Federal Reserve Board setting forth its views.

(The letter referred to appears on p. 8.)

Mr. MOSS. Mr. Keith.

Mr. KEITH. Thank you, Mr. Chairman.

Besides the fraudulent aspects of this that you hope to attack, have you any personal views, or does the Commission have any views with reference to the purpose of the proposed taker-over? What I have in mind specifically is that I have been concerned for a long time with the concentration of power in fewer and fewer corporations and the lessening of competition in the marketplace. I recognize that the anti-trust provisions speak to that particular point and where there is a tendency to create monopoly that there is statutory authority with which to proceed. But do you by chance know of any conglomerates or acquisitions, the primary purpose of which was to pick up a tax loss that in a way gives, by reason of the operation of our tax law, an advantage to one corporation over another if they merge?

Mr. COHEN. Mr. Keith, I appreciate that question because you remind me that I left out some important points that I would like to bring to the attention of the committee.

Mr. KEITH. That is always a hazard that I take when I probe your mind.

Mr. COHEN. Right. Please don't think that I was deliberately holding back for your question, although I am tempted sometimes. Seriously you are raising a very important and a very significant question for the American economy.

I could not express that more seriously and with more concern. We at the Commission, of course, are not involved in and we have no role to play in the general antitrust considerations as you suggested. These bills are not designed to deal solely with the antifraud aspects of

takeover bids. They are designed to provide a form of regulation as I indicated somewhat comparable to the proxy contest situation.

As far as conglomerates is concerned, this is a growing phenomenon. The antitrust people have recently issued some statements which deal specifically with this problem and it appears to me that they are growing more interested in it and more concerned with the effects of this development.

But as I say, this is not my field. I have been concerned with conglomerates and I have been speaking out to this for some 3 years now because of two things. First, if I may digress to point this up, this bill is not directed solely to the situation where there is a takeover bid for dormant, sleepy, unimaginative management which is usually the argument made. Many takeover bids are made by people who find it cheaper to pick up a bright, vibrant company than to go about setting up their own competitor and to this extent they limit competition but they also hope to pick up, at a fairly reasonable price, a company where the possible future value is not yet reflected in the marketplace because the company is in a growing stage. They also unfortunately pick up lemons here and there but when they drop them you don't hear about them. They go out the back door. It is for that reason that I have been concerned for some time now as to the adequacy of the disclosure that is made by these companies most of whom as you corrected me, Mr. Keith, are engaged in disparate businesses which have no relationship to one another.

Very often they are put together not because the businesses go well together but because the financial statements go well together, whether because of provisions of the tax laws or for other reasons. We have had some problems this year in which that has occurred and we have had to insist that a very large conglomerate company revise certain financial data it published in its annual report before the Commission would make effective a registration statement under the Securities Act. I have been after this disclosure problem for some time.

About a year and a half ago the Financial Executives Institute, and this is a marvelous instance of the statesmanship that industry brings to bear on these problems on occasion, came to me and suggested that we await a study that they would undertake and finance in this area.

That study has been completed, and I think the book which reflects the study and the conclusions drawn is just now reaching the bookshelves. They make suggestions for important changes.

The American Institute of Certified Public Accountants at my request, and based on their own realization that there is a problem here, have been looking at this.

The National Accounting Association has just issued a report, so recent that I don't have a copy yet, but I have been informed generally what it is. These are reflections of a view by people who represent or work for management, as well as investors and creditors, that changes are required.

Now, the analysts and the investors have been asking for information in this area for a long time in order to determine better the situation of a particular company and to assess its future prospects in the context of its past history. But it is true, Mr. Keith, that there may be a larger problem involved in all of this and that is the growing

concentration of financial and economic power. That is not involved in this bill and it goes a bit beyond our jurisdiction.

In the proposed institutional investment study, we will deal with another type of growing concentration of economic and financial power which has its effects in the area of the problems to which you have adverted. Beyond that, I don't think it would be appropriate for me to express a view, Mr. Keith.

MR. KEITH. Thank you.

You mentioned that you had ways to get at certain situations where stockholders with 10 percent or more of the stock—

MR. COHEN. Not we, the courts. There is a provision of the statute.

MR. KEITH. Who brings the action?

MR. COHEN. Either the company, or upon failure of the company a shareholder on behalf of the company, and the recovery goes to the company to be shared by all of the shareholders.

MR. KEITH. You have no authority to move.

MR. COHEN. No, sir. We do not.

MR. KEITH. And you are not requesting it.

MR. COHEN. We are not. I think implicit in Mr. Moss' question—and I probably did not answer it—was whether or not the Commission should have authority in this particular area.

I hesitate to say yea or nay to that because whenever I do I am accused of engaging in the latest version of Mr. Parkinson's law, reaching out for power, but quite obviously I would have to say that, provided you vest this power in the Commission after I am gone, this would be a most effective way of dealing with problems of this kind.

Mr. Loomis wants to add to that.

MR. LOOMIS. There are quite a number of cases pending now under section 16 of the Securities Exchange Act, at least five or six of them involving a situation where a person made a tender offer, got 10 percent of the stock and then there was a so-called defensive merger and the person who had made the tender offer then sold the securities he acquired as a result of the merger for a substantial profit.

The courts have not yet decided any of these cases, and it will be interesting to see what happens.

MR. COHEN. There is one further thing to complete my answer to Mr. Moss, with which I did not deal.

In these 16(b) cases, the courts, at least at the appellate level, frequently call upon the Commission to file a brief as *amicus curiae* with respect to interpretation of the statute.

As I say, we have no enforcement powers and for that reason normally we don't even engage in interpretation of 16(b). We do have authority with respect to 16(a), which requires the filing of information with respect to holdings and transactions by certain persons. In this area we have not been too bashful about issuing interpretations. In some of the 16(b) bases we have gone in where there has been placed in issue a question which seems to be important in the overall administration of the statute and may involve adversely the interests of investors. I do not believe we have invited in these particular cases to which Mr. Loomis has adverted.

MR. LOOMIS. They are not on trial yet.

MR. KEITH. Thank you, Mr. Chairman.

Mr. Moss. Mr. Watkins.

Mr. WATKINS. I have no questions, Mr. Chairman, but Mr. Cohen, I want to thank you for bringing in testimony here which certainly will be helpful to us in making a decision.

Mr. Chairman, I would like at this time, with unanimous consent, request that the statement from Johnson & Johnson by their counsel, Mr. Arthur S. Lane, be made a part of the record.

Mr. Moss. Without objection, it will be. The Chair has the original of the letter and had intended making that part of the record.

Mr. WATKINS. That is all.

Thank you, Mr. Chairman.

(The letter referred to follows:)

JOHNSON & JOHNSON,
New Brunswick, N.J., June 28, 1968.

Re S. 510, H.R. 14475.

Hon. JOHN E. MOSS,

Chairman, Subcommittee on Commerce and Finance, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE MOSS: We have today been informed by Washington counsel that the Subcommittee on Commerce and Finance will be holding hearings on Monday, July 1, 1968 on the above legislation. Unfortunately, we will not be able to attend and would appreciate it if you would accept this communication as a statement of our views and have it entered as part of the official record of the hearings.

Johnson & Johnson has in excess of eighteen million shares of common stock outstanding, held by approximately thirteen thousand shareholders. Our shares are listed and traded on the New York Stock Exchange. The purpose of this letter is to present to the Subcommittee our qualified opposition to that portion of the legislation under consideration which seeks to regulate purchases by an issuer of its own shares.

We are generally in accord with the objectives of this legislation as enunciated during the Senate hearings on S. 510. We feel, however, that the legislation under consideration is much broader than necessary to accomplish these objectives. Specifically, there are three aspects which we feel go beyond what is needed: (1) the requirement for advance publication of corporate intentions; (2) the application of the legislation to every purchase no matter how small; and (3) the extension of coverage to persons other than the corporate issuer itself.

The various terms of pre-publication of the issuer's intention to purchase, as required by paragraph (e) (1) of S. 510, not only present problems in compliance, but also may operate to defeat the objective of insulation of the market price from the effects of the purchase. We suggest that, at least in some instances, such advance publicity may cause an increase in the market price. This in turn could affect corporate purchase plans and indeed prohibit accomplishment of the purchase without a further pre-publication. We suggest, except in instances where a substantial proportion of the outstanding shares is to be purchased, such advance publicity is just not necessary to accomplish the legislative objectives.

As to our second objection—the Bill's application to every corporate purchase no matter how small. The proposed legislation exempts from the other requirements of this Bill annual purchases of corporate securities in an amount not in excess of two per cent of outstanding shares. No such exemption, however, is applicable to purchases by the issuer. The legislative objectives do not require regulation of all purchases by an issuer no matter how small the amount. Without such an exemption, many companies, including ours, might be forced to abandon their practice of making small purchases at periodic intervals. Because of the expense and difficulties involved in compliance with legislation, corporations would of necessity have to make larger purchases at less frequent intervals. It is questionable whether this is desirable when viewed in light of its impact on an orderly market for the shares. In addition, this would present our company and others similarly situated with a difficult choice. The volume of trading of our shares on the New York Stock Exchange is comparatively small, considering the number of shares we have outstanding. For example,

during the last week of five-day trading on the New York Stock Exchange, the volume of our shares traded was just over fifteen thousand shares. Thus, any large purchases of shares by us on a single purchase basis could have an effect on the market price. Must we then abandon the practice of purchasing shares on the Exchange for our treasury for uses such as our employee benefit and stock option plans? Nor is it likely that we could find relief through private purchase of our securities. Any shareholders interested in selling could not be expected to maintain interest throughout the period required to prepare and publish information complying with the terms of this legislation.

As to our third concern—the extension of coverage to persons other than the corporate issuer. The scope of this extension is so broad that it would include purchases by the independent trustee under our issuer's pension plan, over whose investment decisions the issuer has no control, as well as purchases no matter how small by any person deemed for purposes of the Securities Exchange Act to be a controlling person. With regard to the independent trustee, the severe restrictions on the exercise of its discretion imposed by this legislation could well result in its decision not to purchase any of the issuer's shares, a situation which we do not believe would be either in the interests of the pension plan or of the corporate employees. With regard to the application of the legislation to a controlling person, the time and money required to comply with the legislative mandates would, we suggest, in effect prevent any future purchases of issuer's shares by such person.

I wish to thank you for the opportunity to submit our views and, in closing, let me strongly urge that your Subcommittee adopt an amendment to this legislation which would exempt annual purchases by an issuer, however defined, of an amount of shares not in excess of two per cent of the outstanding securities.

Very truly yours,

ARTHUR S. LANE.

Mr. COHEN. I am not familiar with that letter, Mr. Chairman, but I had heard that there was a telegram which had been received by the committee from another company and if the Chair wishes I can sort of respond to that off the top of my head.

Mr. WATKINS. Mr. Chairman, I would like to know who the other company is.

Mr. COHEN. American Home Products, I think. That telegram, as I recall it, suggested that it would be unwise to require the management of a company to be subject to the bill and in this regard they mean the reporting of information to the Commission with respect to repurchase by the company of its own shares; that is, at least up to the extent of 2 percent a year.

First of all, I think there may be some misconception unless I have not been properly informed as to the nature of the telegram. The provision of the statute which deals with that point as I understand it contains no prescription. It allows to the Commission authority to develop appropriate rules and in developing any rules as I indicated earlier, we do this by noticing a proposed rule so that we can get the comments from all persons concerned before we adopt a rule. It would be pretty much the same practice that we have engaged in under the proxy rules and, therefore, I do not see any problem that is raised by the American Home Products Co. that can't be adequately dealt with administratively.

Mr. WATKINS. Mr. Chairman.

Mr. MOSS. Mr. Watkins.

Mr. WATKINS. Mr. Cohen, if you have any information why don't you file that with the committee here and make it part of the record.

Mr. COHEN. I don't have the information. I just heard about this, Mr. Watkins.

Mr. WATKINS. Let's don't put in anything that we heard about. Let's make it part of the record.

Mr. COHEN. I don't have any document.

Mr. MOSS. A copy has been directed to me from American Home Products Corp. If there is no objection the telegram will be included in the record at this point.

Mr. WATKINS. No objection.

Mr. MOSS. With no objection the telegram is made a part of the record.

(The telegram referred to follows:)

[Telegram]

AMERICAN HOME PRODUCTS CORP.,
New York, N.Y., June 28, 1968.

HON. JOHN E. MOSS,
Rayburn House Office Building,
Washington, D.C.:

Understand Subcommittee on Commerce and Finance has scheduled hearings on H.R. 14475, S. 510 and companion bills for Monday, July 1. As major listed corporation, find provisions which would require us to give advance disclosure of number of shares to be purchased and price to be paid therefore are totally unreasonable. They would have effect to setting a floor on market price and therefore would compel guaranteed market price fixing.

This seems contradictory of alleged antimanipulation purposes of legislation. Request you consider exempting from purview of proposed subsection issuer's purchase of own securities which do not in any 1 year exceed 2 percent of its then outstanding shares of class involved. Such provision already in subsections 13(d) and 13(f) of S. 510 and would remove our objections to proposed subsection 13(e) if such exemption incorporated therein. If this not possible, respectfully request opportunity on reasonable notice to testify or file statement opposing this legislation.

GILBERT S. MCINERNY,

Vice President and General Counsel, American Home Products Corp.

Mr. WATKINS. Mr. Chairman, I yield to Mr. Keith, if I have any time left.

Mr. KEITH. Mr. Chairman.

Mr. MOSS. I will see that you have the time.

Mr. WATKINS. Thank you.

Mr. KEITH. Are there other witnesses that are going to appear and comment critically on the proposal that might speak to the point that is made by American Home Products Co.?

Mr. MOSS. None requested to appear.

Mr. KEITH. I understood that Johnson & Johnson did not request to testify but just to put the information in the record.

Mr. WATKINS. If the gentleman will yield, Johnson & Johnson were unable to be here and asked that their statement be filed.

Mr. COHEN. If I may interpolate here, with the chairman's permission, we have not been aware of any opposition to the bill except from a couple of professors and I was not altogether sure whether opposition was the right word to describe their position. I think the bill has been supported by all segments of the securities business and representatives of industry generally. This point that was raised I thought I might advert to because I had heard about it. It may also be in the Johnson & Johnson letter. I think Phil Loomis can speak to it and give you the provision of the bill.

Mr. LOOMIS. I think both American Home Products and Johnson & Johnson are under the impression that the bill would require corporations to give advance public notice if they were going to purchase shares, stating how much, and what price. The bill does not so provide.

Mr. KEITH. It is a very short telegram, and perhaps you could speak more to the point if I read it, if I may, Mr. Chairman.

Mr. MOSS. You certainly may.

Mr. KEITH. This is from American Home Products.

(The text of the telegram read by Mr. Keith appears on p. 36.)

Mr. KEITH. Would you comment to the points they make?

Mr. COHEN. I think that was essentially what I heard. First, I should point out that that telegram is addressed to only one subsection in the bill.

No. 2, they want exemption for purchases by the company for up to 2 percent.

Now, I have this to say.

One, the bill does not require the information which they seem to suggest is required by the bill. The bill merely authorizes the Commission to adopt appropriate rules to deal with a number of problems, and that is one of them, to the extent that the Commission considered it appropriate.

That is the No. 1 item. Maybe it is inappropriate for me to deal with the merits of some such suggestions which may be the subject of rule-making. Nevertheless, I think experience has shown that, with respect to some companies where the floating supply of securities is rather limited, the purchase of stock even up to 2 percent may have manipulative effects if as suggested in the telegram, with which apparently the writer agrees, the bill is designed to be antimanipulative. I think Mr. Loomis has something to add to that.

Mr. LOOMIS. The bill does not require advance notice of the price and incidentally the Continental Insurance Co. which is perhaps the largest casualty company in the United States has been engaged in purchasing its own shares over the last couple of years.

The New York Department of Insurance requires that they furnish a notice of their intentions. This has been done in each of the last 2 years and there has been no manipulative consequence.

Mr. COHEN. In fact, under the Investment Company Act with which you gentlemen are familiar, adopted in 1940, there is a specific requirement which relates to closed end companies essentially that at least

6 months before the company proposes to engage in these activities, I think it is 6 months, there be some notice to shareholders. This has never been viewed as manipulative. Actually, these are designed to be antimanipulative because of the exposure to daylight of the intentions of various parties.

Mr. KEITH. Would you tell me if there is any significance to the use of the treasury stock in attaining these objectives?

Mr. COHEN. No. I don't think the bill deals with treasury stock as such because the bill requires information with respect to the purchase of stock, outstanding stock. Stock held in the treasury I am not sure is affected by this bill or by any rules conceivably at the moment that the Commission might adopt under this particular section.

But I think your question is significant in the light of the point I made earlier that there are many companies that do hold a substantial amount of the outstanding shares in the treasury and in addition other people hold the shares so that the market is very thin. In such situations the acquisition of 1 percent, not talking in terms of a year, but the acquisition of a concentrated block of stock of 1 to 2 percent within a narrow period of time could have an effect.

I don't think anyone could predict without the context whether or not it is manipulative or nonmanipulative, but I want to emphasize that there is nothing in the bill that requires that disclosure in the case cited by the person that sent that telegram.

Mr. KEITH. I am not certain that I see the problem in the same way you do. I am completely unfamiliar with it except for this morning's discussion, but I would think that a company like American Home Products in the business of picking up smaller companies to increase their capability of serving the public with a larger inventory for the salesman to sell might be using their treasury stock to pick up smaller companies.

Mr. COHEN. That is true. That happens. Mr. Keith, as a matter of fact, but there is nothing in the bill here which affects that one way or another. It would be subject to the same requirements.

For example, if it was a stock for stock exchange, the issuance of treasury stock or newly issued stock would be subject to the registration and prospectus requirements of the Securities Act so that I don't see that anything in the bill affects that situation one way or another unless there is some aspect of it concerning which I cannot now address myself.

Mr. LOOMIS. Except if, as the House bill provides, such transaction is subject to the bill. Then solicitations by anyone for or against acceptance of such a treasury stock offering could not be false, misleading or deceptive.

Mr. COHEN. I guess I overstated the situation.

I think I understand the point now. Forgive me. It is not uncommon and the bill is directed to that. It was just the status of treasury stock on which I said the bill had no effect, but, quite often, we find companies faced with a takeover bid, or a worry that one was coming along, will attempt to buy up such available stock as they think may put them in a more strategic position with regard to any person who is engaged in a takeover.

Sometimes they will buy it directly and it becomes treasury stock, but that is just the legal status of it. Frequently the stock is put in the name of another entity so that the stock can be voted because in almost all States a company is prohibited from voting its treasury stock and this, too, is the subject of litigation from time to time.

Sometimes the stock is bought in friendly hands. It is the acquisition of the stock and its use in the contest that is dealt with in the bill, but its particular status, once the company acquires it, I think, is unimportant here.

Mr. KEITH. How much notice was given with reference to these hearings, Mr. Chairman, to the industry as such?

Mr. MOSS. I think that they have been anticipating the hearings for some time, and specifically this was probably sent out Wednesday or Thursday.

Mr. KEITH. Late last week. Apparently Johnson & Johnson is a Washington-based firm and should have expertise in this area. I wondered.

Mr. WATKINS. Would the gentleman yield?

Mr. KEITH. I yield.

Mr. WATKINS. I can say to you, Mr. Keith, that I think and agree with our chairman that they expected hearings on this bill, and to pass on the information that I have had from Johnson & Johnson and also with the permission of the chairman, I would like to add the name of Wyeth Laboratories in concurring, the information that I received from Mr. Elias as the vice president of the Wyeth Laboratories was that he concurs in the thinking of Johnson & Johnson's statement filed by counsel, Mr. Arthur S. Lane.

I would say that not in defense of anyone that they did anticipate hearings, but this was rather put to surprise.

I would perhaps concur with our chairman that we are drawing to the end, and if this is an important matter, perhaps it should be acted upon with more expediency than we intended. I don't like to protect John Moss.

Mr. KEITH. I would just like to ask if there is anybody here from Johnson & Johnson, American Home Products, or Wyeth International.

Mr. COHEN. There must be some coincidence. All three companies sell drug products. Maybe they are thinking of another committee or some other subject.

Mr. KEITH. I don't think so.

Mr. COHEN. I am kidding.

Mr. WATKINS. I think they are very much interested from the information I received.

Mr. COHEN. Seriously, Mr. Keith, in order to put your mind at rest, this matter has been the subject of discussion with the industry. I have discussed it with them—in fact, with most of industry—and I am talking about the securities industry, as well as industry generally, have felt that in this area this legislation is not only desirable, but it is essential and the sooner the better, and they have been aware of it for at least 3 or 4 years.

Mr. KEITH. I concur in your objectives, but if we can uncover a flaw—

Mr. COHEN. But there is none here because there is no requirement of the statute that deals with this problem.

Mr. KEITH. I am glad that in your view there is no flaw.

Mr. COHEN. I will cite you the section.

Mr. KEITH. Never mind.

Mr. WATKINS. Would the gentleman yield, because I judge you have the floor.

Mr. COHEN, that is a broad statement that there is no objection. I assure you that I shall have an amendment in the marking-up time of this bill to offer to the committee. I don't think you should speak for everybody. You speak for the SEC, and that is it. If you haven't talked to these other people, how can you express their views?

Mr. COHEN. With all due respect, Mr. Watkins.

Mr. WATKINS. How can you express the views of Johnson & Johnson or Wyeth Laboratories, if you haven't consulted with them?

Mr. COHEN. May I finish, Mr. Watkins?

Mr. WATKINS. Yes.

Mr. COHEN. I haven't consulted with each company separately, but I have spoken to the American Society of Corporate Secretaries and various other industry groups on this subject and the only thing that I have heard is in many cases that this bill is long overdue and should be adopted as promptly as possible.

Now as to a specific point of it, I can see that there may be differences of opinion, and undoubtedly there are some. I was only trying to tell Mr. Keith something I am sure he already knew anyway, that this has been exposed very widely to all industry and indeed this is not a Commission bill. This bill was suggested to the Congress by industry.

Mr. WATKINS. We are not denying that. No one has to cover for Mr. Moss, but I said that I knew that they were aware that there were going to be hearings, but it came quickly, and I can understand why the chairman perhaps is pressing it now.

But don't speak for these other people if you haven't talked to them because I shall offer an amendment to the committee in behalf of Wyeth and Johnson & Johnson.

Mr. COHEN. Mr. Chairman, do you have anything further you wish to ask me?

Mr. MOSS. Mr. Stuckey.

Mr. STUCKEY. Mr. Chairman, how are you today?

Mr. COHEN. Fine, thank you.

Mr. STUCKEY. It is always good to have you before the committee.

I have two minor questions. Don't you have to disclose now if you have over 10 percent of the control of the stock?

Mr. COHEN. Yes, you do.

Mr. STUCKEY. That is what I thought.

Mr. COHEN. If you have over 10 percent.

Mr. STUCKEY. Could a person go out and under a street name purchase 9 percent and—

Mr. COHEN. The statute requires the disclosure of beneficial ownership. There have been a few situations, not many, in our knowledge where that has not been disclosed, but we have been able, I think, generally speaking, to catch up with them and require disclosure. The requirement is beneficial ownership and therefore holding the

shares in street name or any other nominee name is not any basis for exclusion from or exemption from the statute.

Mr. STUCKEY. But your interpretation would revolve around the term of what was beneficial?

Mr. COHEN. Yes, sir.

Mr. STUCKEY. So that a person could actually under a street name purchase 9 percent and go to another firm and purchase 9 percent?

Mr. COHEN. Under the present law he could, yes.

Mr. STUCKEY. Is that needed to be clarified in this bill?

Mr. COHEN. Up to 10 percent the present law doesn't require anything, but if he goes beyond 10 percent under the present law, he would be required to file a report with the Commission that he now owns more than 10 percent of the stock.

Mr. STUCKEY. But a person could get around it through this method, right?

Mr. COHEN. No, because beneficial ownership is the test. He might try to get around it, and that would be a violation of law, but the legal requirement is beneficial ownership.

Mr. STUCKEY. So it revolves around that?

Mr. COHEN. Yes, sir.

Mr. STUCKEY. Secondly, would there be any strong objections from the Commission as to the size of the corporation that this would apply to because I could see where this could be some type of handicap to a small firm.

Mr. COHEN. I think that perhaps when you are dealing with small firms, they might need more protection, talking about the shareholders, than a large firm because they don't have the financial or other resources to deal with some of the big fellows that come along and try to gobble up some of the smaller firms.

So that, if you had to make a judgment, it seems to me that you need the protection more there than with the big firms that have all the sophisticated counsel and finance that are necessary in this form of industrial warfare.

My position is that all shareholders, whether in small or large or medium-sized companies, need this protection.

Mr. STUCKEY. So you all would have objections?

Mr. COHEN. Yes, sir.

Mr. LOOMIS. Could I add that this bill applies only to shares which are registered under the Exchange Act so that the really small companies are not subject to it.

Mr. COHEN. These are companies with a public interest. That is made clear in the statute.

Mr. STUCKEY. One final question: Do you think that 5 days is sufficient time?

Mr. COHEN. Well, actually I said earlier, Mr. Stuckey, that under our proxy rules which have evolved over a considerable period of time and with the assistance of industry and the bar associations and such, we now have a requirement that material be filed with the Commission 10 days before it is to be released, but we also provide that that period can be shortened by the Commission and we frequently do where that seems to be important and particularly in proxy contests we frequently will clear material filed in the morning within 2 hours

after it is filed so that no one can get an advantage because of the fact that some of our people may not be moving as rapidly as possible.

Mr. STUCKEY. I am not talking about the time necessary for the Commission. I am talking about the public at large.

Mr. COHEN. Oh, the public, no, there is nothing in the statute which limits the public examination of the situation to 5 days.

Mr. STUCKEY. I am saying: Do you think 5 days is sufficient time for them to be completely aware and in a sense educated as to what is involved in one company making a tender to another?

Mr. COHEN. Based on experience in the past couple of years I would say no, Mr. Stuckey.

Mr. STUCKEY. This has been my concern, that the 5 days seems rather short.

Mr. COHEN. We have seen situations and in fact I testified in the Senate about one particular smaller company that was involved in five takeovers coming along at different periods, and the shareholders didn't have the information and 5 days would have made it impossible.

Mr. STUCKEY. For the protection of the public, if we are going to get a bill through similar to the one that we have before us, would not the Commission favor, say, instead of 5 days, to say 5 trading days or 10 days?

Mr. COHEN. There is no such provision in the bill.

Mr. STUCKEY. I know that. That is the reason I am asking the question. Would this not be more beneficial to the public at large to have more time?

Mr. LOOMIS. There is no limitation in the bill of the time to 5 days for the public to consider the tender offer. In our view they do need more than the 10-day provision that is in the Senate bill.

Mr. STUCKEY. That is what I am saying.

Mr. COHEN. I have to explain about that. That 10-day provision that is in the Senate bill relates to revocation of deposits pursuant to tenders, pro rata arrangements and similar matters. As I testified in the Senate, we objected to that provision because we did not think that it was protective of the investor. It might be protective of one of the parties but, after all, our interest here is the investor. We are not trying to seek to help one or the other parties to the contest.

I am sorry I didn't understand the purport of your question earlier. We would be against any such limitation.

Mr. STUCKEY. No further questions.

Thank you, Mr. Chairman.

Mr. Moss. Are there any further questions?

If not, gentlemen, I want to thank you for your appearance here this morning.

Our next witness will be Mr. Donald L. Calvin, vice president of the New York Stock Exchange. He will be accompanied by Mr. Phillip West, vice president and director of the department of stock list.

STATEMENT OF DONALD L. CALVIN, VICE PRESIDENT, NEW YORK STOCK EXCHANGE; ACCOMPANIED BY PHILLIP WEST, VICE PRESIDENT AND DIRECTOR, DEPARTMENT OF STOCK LIST

Mr. CALVIN. Thank you, Mr. Chairman.

We at the New York Stock Exchange appreciate the opportunity to appear here this morning. What I plan to do, with your permission, is to read a brief, prepared statement and then answer any questions you might have. We also would be willing to attempt to answer any questions that you have as we go through the prepared statement.

I might take a moment and introduce Mr. Phillip West, a vice president of the exchange and the director of its department of stock list.

His function among other things, is to supervise and to administer the policies of the New York Stock Exchange relating to the activities of companies whose shares are listed on the exchange. He has great familiarity with this area.

I would also say, before I get into the statement, that we agree with Chairman Cohen in what he said this morning. There is a great need for this legislation, and the New York Stock Exchange and other organizations in the securities industry have supported the objectives of this legislation. I am sorry that more of them aren't here this morning, but I would mention that in the Senate hearings the New York Stock Exchange was joined in supporting the legislation by the American Stock Exchange, the Investment Bankers Association of America, and the National Association of Securities Dealers, Inc.

The problem that we have is basically with two provisions in the House bill. I will now begin reading our statement.

The exchange supports S. 510 but opposes H.R. 14475, because it contains provisions which would be disruptive to market practices which have been demonstrated to be in the public interest.

In our view, the primary objectives to be accomplished by this legislation are to provide full and fair disclosure to shareholders—

- (1) In connection with cash tender offers or through open market or privately negotiated purchases; and
- (2) When a corporation repurchases its own equity securities.

The exchange has followed the development of this legislation since the first bill in this area was introduced by Senator Harrison Williams, in the last session of the 89th Congress. We have supported the objectives of these bills from the outset. A number of suggestions that we made as to specific provisions of S. 510, in the extensive hearings before the Senate Banking and Currency Committee in March 1967, are now incorporated in S. 510 as passed by the Senate.

The New York Stock Exchange has had policies regarding tender offers for almost 14 years. Because of the absence of any Federal legislation, the exchange has been the only regulatory authority active in this area. A number of witnesses at the Senate committee hearings testified and endorsed the exchange procedures.

Our analysis of H.R. 14475 is that it is basically the same as S. 510 was prior to amendments by the Senate Banking and Currency Committee.

Parenthetically, I would say, after reading this sentence again, it is not totally accurate. There were changes made in H.R. 14475 that paralleled many of the changes that were made in S. 510, as amended. We are really talking about the two provisions that we will get to in a minute.

These amendments were adopted after hearings on the bill in March 1967. The amendments removed features which the hearings showed to be highly objectionable.

The two major differences between the two bills are: one, the timing of the filing with the SEC; and two, the period for pro rata acceptance of tender offers.

1. Timing of filing with the SEC

Both bills require that a statement disclosing pertinent information be filed with the SEC, an objective with which the exchange agrees. S. 510 requires that the statement be on file with the SEC at the time the tender offer is announced to the public. H.R. 14475 would require the filing on a confidential basis with the SEC 5 days prior to public announcement.

Some background on how tender offers are conducted is important to explain the problems created by the 5-day advance filing requirement. Tender offers are invitations to shareholders to sell all or part of their shares at a price which is usually substantially above current market levels. Corporate management is bypassed, and shareholders are asked directly to sell their shares to the offeror.

The course of a typical tender offer is somewhat as follows:

(1) The offeror makes a public announcement that it is willing to purchase a specified number of a company's shares at a price above the current market.

(2) The offer is open for a specific period, usually 10 days or more.

(3) The offer usually requires that the shares must be irrevocably deposited by the specific expiration date.

(4) The offeror is not obligated to purchase any shares, if the number sought is not received.

(5) If more shares are received, the offeror need not purchase the excess.

(6) Some offers provide that the period may be extended. If so, the shares previously tendered are still irrevocably deposited.

Obviously, a company intending to make a tender offer strives to keep its plan secret. If word of the impending offer becomes public, the price of the stock will rise toward the expected tender price. Thus, the primary inducement to stockholders—an offer to purchase their shares at an attractive price above the market—is lost, and the offeror may be forced to abandon its plans or to raise the offer to a still higher price. The cost of an offer to purchase hundreds of thousands of shares might prove prohibitive if the price had to be increased only a few dollars per share.

A legislative requirement that increases the chance of premature disclosure of an impending offer can only serve to discourage the use of tender offers. These offers may be of great benefit both to the shareholders whose stock is being sought, and those of the company making the offer.

To insure secrecy and avoid leaks and rumors, and because the relationship between the tender price and the market price is so

critical, tender offers are normally made to shareholders immediately after a decision to make the offer is reached and a price has been determined. In spite of all precautions, there have been cases where tender offers have been preceded by leaks and rumors, which caused abnormal market problems. We believe the 5-day prefiling requirement will lead to the premature disclosure of impending tender offers and, therefore, result in market disruptions. We base our opinion on our experience with tender offers and our related market surveillance.

I would add, at this point that, if the committee would like, at the conclusion of this statement, Mr. West can recite some examples of where market disruptions have occurred in comparable situations.

Let us examine some practical problems which would result from this 5-day advance filing requirement. Suppose a company listed on our exchange wishes to acquire 10 percent or more of another listed company's stock by a tender offer. Its board of directors must authorize the filing of the advance statement with the SEC.

Presently, under the disclosure policy of the exchange, the company should make a public announcement of its intention as soon as the board of directors has acted. In order to maintain a market fair to all investors, the exchange can then temporarily halt trading in the stocks concerned, pending a public announcement of the offer. If, however, the prefiling requirement in the House bill is enacted a company would be prohibited from providing this information to the public, since to do so prior to the expiration of the 5-day period would be a violation of the Securities Exchange Act of 1934.

Since the advance statement must be held in confidence by the SEC, the Commission would paradoxically prohibit a public announcement informing shareholders that within a few days there may be an offer to purchase their shares at a price in excess of the current market. This would work to the disadvantage of investors.

For example, a small shareholder anywhere in the country may decide to sell 100 shares of his stock on the fourth day after a statement is filed with the SEC. The next day the tender offer is announced at a price of \$7 a share above where this small investor sold his stock. His shares were sold for \$700 less than he would have received as a result of the offer. Thus, because of the prefiling requirement, the shareholder is prevented for 5-days from learning of the desire of another to buy his stock at a premium.

In some situations, insiders having the benefit of advance information during the 5-day period could take advantage of shareholders who sell their shares unaware of the impending offer.

No matter how diligent a company may be, it cannot guarantee that news of its approaching offer will be held in confidence for 5-days. We cannot escape the fact that people talk. Their motives may be innocent. Nonetheless, purchases by persons knowing of the imminent tender offer might drive the price of the stock up to the tender price. This could have the effect of forcing the abandonment of a tender offer which would have been beneficial to shareholders.

During these 5 days, market activity would be taking place while the SEC was reviewing the information statement. The SEC could accelerate its review. Nevertheless, it would have to accelerate in every

case to avoid the basic unfairness to shareholders. Therefore, the only fair approach from an investor's standpoint is immediate disclosure as is required in S. 510. Otherwise, the public's receipt of important information would be delayed to its detriment and legitimate market offers would be unduly impeded. And both results would be in direct conflict with the stated objectives of the bill.

Trading is normally halted in a stock where there are rumors linked to a tender offer. If the 5-day provision in the House bill became the law, the exchange might be forced to halt trading in the stock for the period during which the SEC was conducting its confidential review of the information statement.

The exchange would be in the anomalous position of having to halt trading due to market disruptions occasioned in large part by the operation of a law designed to provide full disclosure to investors. Thus a law and the enforcing agency could operate contrary to the best interests of shareholders.

The pre-filing proposal might also provide an opportunity for market manipulations. An information statement might be filed solely to provide the basis for rumors of an impending offer for a company, without any intention of making the offer. The price manipulation could then take place, and it would be difficult, if not impossible, to prove that such manipulation was intended.

For these reasons, the exchange endorses section 2 of S. 510, which provides that an information statement containing the provisions now itemized in both bills be filed with the SEC at the time a tender offer is publicly announced.

Further, S. 510 permits a shareholder to withdraw any shares he has tendered within 7 days after commencement of an offer. Thus, the bill gives a shareholder 7 days in which to become familiar with the information in the statement, or to be informed of any SEC action which might convince him to withdraw his shares.

I would like to speak to that provision for a moment, if I may, Mr. Chairman. That provision of the bill, as we understand it, provides that if I tender my shares in response to an offer, and then some development occurs, or I have a change of heart, or some greater disclosure is made, I may still withdraw those shares during the 7-day period.

In other words, I am not committed during that period of time.

We think this is an important safety valve that is in both bills. And it is particularly important if you adopt the S. 510 approach, and have immediate disclosure, because it still gives shareholders tendering their shares 7 days to decide whether they want to make this an irrevocable act on their part.

It also gives the SEC time to examine these statements and, if additional disclosure is required, they can have this disseminated and shareholders can act in response to that.

Mr. STUCKEY. May I ask a question, Mr. Chairman?

Mr. MOSS. You certainly may, Mr. Stuckey.

Mr. STUCKEY. Let us say that Company A makes a tender offer to Company B, at \$10 above the market price, and they can put their stock up and take it out within the 7 days, right?

Mr. CALVIN. Yes.

Mr. STUCKEY. All right. What if Company C comes in and makes an offer to Company B, knowing that within the 7 days they can take it out at \$11 a share, and a lot of this is happening now. Actually you could encourage bidding among companies trying to take over Company B.

In this I think you are getting yourself into a lot of trouble because we have a problem with it now.

Mr. CALVIN. I think it is written into the bills now that if there is a subsequent offer, the 7-day provision begins to run again. I think that is the way the bill is drafted now.

Mr. STUCKEY. Say that one more time.

Mr. CALVIN. In other words, if there is a subsequent offer at a higher price, then the 7-day provision, the right of withdrawal during the 7 days, runs again. They are not committed after the expiration of the first 7 days. This is, in effect, a new offer.

Mr. STUCKEY. I know, but I am saying that this is what you are encouraging, and I think this is something we ought to get away from.

Mr. CALVIN. What we are interested in here is that shareholders have ample time to make an informed decision. That is the reason for the 7 days.

Mr. STUCKEY. I am for the same thing, but I am still saying, let's say that the person has 5 or 6 or 7 or 10 days to know of the offer and you will never stop the rumors. In fact, it is probably better that you can't, but let's say a person does have notice of an offer. He puts his stock up, and another company says, "Look, for \$1 more we can take it away from him."

So that really you are encouraging this because they know that within that 10 days they can pull out their stock and take the higher offer.

Mr. CALVIN. That is true.

Mr. MOSS. Does Mr. West want to comment?

Mr. WEST. We think competition is the life of trade, and if they want to increase it, let them do it. It is a healthy thing.

Mr. CALVIN. We did object to one thing on the Senate side. It was a proposal that the tender be revocable during the whole period of the offer. In other words, if it was made to run for 60 days, any shares deposited could be withdrawn during that whole period.

We objected to that because it would lead to the point I think you are making, total uncertainty and no commitment at all. We thought the 7-day requirement was a realistic one and a reasonable period of time for people to become informed.

Mr. STUCKEY. Would it be in order to ask the Chairman of the SEC to comment on some of this at this time?

Mr. MOSS. Without objection.

Mr. KEITH. I have no objection.

Mr. WATKINS. I have no objection.

Mr. MOSS. Mr. Cohen, would you respond to this?

FURTHER STATEMENT OF HON. MANUEL F. COHEN

Mr. COHEN. I would be glad to.

We think that competition is the life of trade, too. We don't always find that statement coming from the industry, but I have to admit that we believe in that very, very firmly.

In this particular situation we are troubled with the Senate bill for the following reason. We had urged that the deposit be revocable, as Mr. Calvin indicated, for a substantial period of time, for a number of reasons, including those Mr. Stuckey pointed out. This goes to another point, and I will deal with it, if you wish.

The rumors with regard to the possibilities become rife long before anything happens and there are situations where people, knowing that negotiations are going on between two parties, will run in with a bid in the hope that, under this bill, for example, if the 7 days expire, they have an automatic profit because when the other fellow comes in they pick up the shares deposited even though the other fellow is offering twice as much. It doesn't even require going to the bank to make a profit. That has happened.

That is why we felt that it ought to be open because the shareholder is the fellow who is caught. That is why we think the 10-day period also compels people to rush and deposit before they have the benefit of information with regard to competing offers.

The history in this area has been that there have been competing offers and it is more so all the time. On this problem about rumors, as I indicated earlier, many offers are made by stock for stock exchanges, which are subject to registration under the Securities Act.

They have to file a registration statement at least 20 days before it becomes effective. The price is usually determined the day before effectiveness in the ordinary offering.

I think Mr. Stuckey is right. The sooner there is information about a prospective offer, the better, but that doesn't mean that they couldn't submit the information to us ahead of time even without the price as they do in registration and proxy statements today and in many other areas of the Commission's work.

We have enough flexibility to allow them to come in at the very last second with the price. We have permitted them to put the price in the material after they file it with us. I don't see any problem here. But we are seriously concerned that these things would work to the disadvantage of the investor rather than to his advantage.

I must say that I am sure my colleagues on both sides of me (Mr. Calvin and Mr. West of the New York Stock Exchange) believe just as firmly and sincerely that the 10-day limitation is in the best interests of the shareholders. I don't think they have any other motive. There is just a difference in our experience and attitude toward what is in fact possibly in the best interests of the investor.

Mr. STUCKEY. This also could work a disadvantage to the corporation making the tender.

Mr. COHEN. That is exactly right. This is exactly why we want to keep this bill completely free of any influence by the Government or otherwise or by action of the Congress so that the forces in contention can have full play. Anybody who feels he would like to make an offer can do so with full information and the shareholder will have a fair opportunity to consider them all and to arrive at an informed decision.

As it is right now, and as it may be under this bill in this respect, the poor shareholder may become a pawn. That is what we are worried about. I am sorry.

Mr. STUCKEY. Thank you, sir.

Mr. MOSS. Thank you, Mr. Cohen.

Mr. CALVIN. May I make one very brief comment?

Mr. MOSS. Certainly.

Mr. CALVIN. We agree with Chairman Cohen, obviously, that there is a need for the legislation. We have an honest disagreement as to approach. In our experience—and Phil West has been with the New York Stock Exchange for 40-some years, and has been head of the Department of Stock List and active in this area for most of that time—you have to have immediate disclosure. This is basic. This is a cardinal principle of the New York Stock Exchange. Even though the price was not filed in in the information statement, if the word got out that it had been filed, everyone knows it is going to be at a higher price than the current market. Whether it is \$2 more or \$5 more is not going to be that important. They know it is going to be more.

What we want and what we are interested in is in the Senate bill. It is in accord with our basic disclosure philosophy.

With that, I will continue with the statement.

Mr. COHEN. Mr. Chairman, may I interrupt?

Mr. MOSS. If there is no objection.

Mr. COHEN. If it is merely disclosing that they have filed something with the Commission, we would certainly have no objection to that.

Mr. CALVIN. But that isn't the problem. I say that it isn't sufficient to disclose the filing. You will know that these people cannot act in response to the offer. They know that it is going to be at a price higher than the current market price. The only thing to do is make the offer immediately, and file with the SEC at that time.

That is our disagreement. I think it is obvious to the committee.

If I may go on, Mr. Chairman.

Mr. MOSS. Certainly you may.

STATEMENT OF DONALD L. CALVIN—Resumed

Mr. CALVIN. In addition, all statements filed with the SEC would be subject to current provisions of State and Federal securities laws, which would protect those shareholders whose shares are being solicited by a tender offer from fraudulent and deceptive practices. These penalties should, in our opinion, normally be sufficient to insure that the information statements filed with the SEC will be accurate and complete in the first instance.

2. Period for pro rata acceptance of tender offers

Another of the exchange's suggestions to the Senate Banking and Currency Committee was that the period during which an offeror was required to prorate his acceptance should be limited to 10 days. This requirement was adopted and is now incorporated in S. 510, H.R. 14475, however, requires that the offeror must purchase on a pro rata basis for the full period of the offer. I would add, in the interests of full disclosure, it does give the Commission rulemaking authority, as pointed out this morning. We urge the subcommittee to adopt the limitation embodied in section 2 of S. 510, requiring pro rata acceptance of shares offered for the first 10 days of the offer period.

Some pro rata period is essential to permit shareholders to consider the offer and still have time to tender their shares.

A lengthy pro rata period works to the disadvantage of both the offeror and the tendering shareholder. The offeror cannot determine the percentage of shares which will be accepted. The tendering shareholder's entire holdings may be "locked in" for months only to have a major portion returned at the end of the pro rata period.

In other words, there is no certainty for either side. Our argument is that you have to cut it off at some point in time.

We believe that a combination of a 10-day pro rata period, followed by a first-come first-served period, is fair to all concerned. This has been the policy of the exchange which has stood the test of time in practical use.

Under this method, the original offer provides that if the number of shares tendered during the 10-day pro rata period is fewer than the number sought, shares will be purchased thereafter in the order in which they are received.

Market disruptions would also be more likely under a requirement that all tender offers must be made on a pro rata basis for the entire period.

Had there been such a requirement in the past, it would have increased both the length of tender offers and the time in which large blocks of stock would have been tied up. Withdrawing a sizable amount of a company's outstanding securities from the market for an extended period can drastically reduce the supply of stock available for trading. A limited supply of stock can produce abnormal price fluctuations.

We believe that the minimum 10-day pro rata procedure, as provided in S. 510, is fair to all concerned, while the unlimited pro rata period in H.R. 14475 will work to the detriment of the investing public.

In conclusion, the exchange supports S. 510 but opposes H.R. 14475.

Again for these two basic reasons: Accordingly we suggest that the committee report out S. 510.

Thank you, Mr. Chairman.

Mr. Moss. Mr. Keith.

Mr. KEITH. Suppose that we go along with H.R. 14475. Would you rather have no bill than H.R. 14475?

Mr. CALVIN. May I give you my opinion first. That is a tough question because there is a need for legislation in this area. I would say, however, that we feel that the 5-day advance filing period is going to be very, very disruptive to the maintenance of a fair and orderly market. For that reason, we would rather have no bill at this time, and then try to get a bill that we think is workable. S. 510 provides for the 10-day pro rata period that we think is a workable procedure and that we have had for years. We think everyone agrees that it should not be pro rata for the whole period of the offering. The SEC does have rulemaking authority in the provision in H.R. 14475, but we think that some degree of certainty would be more desirable, like the S. 510 provision. But our problem with H.R. 14475 is basically the 5 days' advance filing with the SEC.

Mr. KEITH. So that in the absence of compromise you would settle if you got one of your two objectives.

Mr. WEST. I think so.

Mr. KEITH. Particularly if you get the 5-day provision.

Mr. CALVIN. Yes.

Mr. KEITH. Now, Mr. Cohen.

Mr. COHEN. I testified this morning that although we think that is wrong the legislation is important and, if this committee decided in its wisdom to adopt S. 510, we would do our darndest to make it work. Therefore, we would not interpose any objection. But I do want to point to one thing that I think was probably not intended, which is an inconsistency. Mr. Calvin suggested that having this pro rata situation for a longer period of time can have an effect on the market because stock would be locked up so to speak. I think those are the words.

Well, if a tender can be revocable at all times it is not locked up and if the market price adjusts, as it does, the shareholder will have a choice whether or not he wants to wait until the end of the tender period or sell, whereas with the provision that after 10 days you are locked up there is no question about it that the offeror can keep that stock locked up and not available to the market for as long as his underlying provision permits him to.

In other words, he says, "I will make an offer for 30 or 60 days with the right to extend it," and he could look it up for months.

Mr. STUCKEY. Would the gentleman yield.

Mr. KEITH. Certainly.

Mr. STUCKEY. While I think your responsibility goes to protect the investor I think you are really putting a heck of a hardship on a corporation under the assumption of even 20 or 30 days.

Mr. COHEN. Not on the corporation. The problem would be on the offeror if there is one.

Mr. STUCKEY. However, you want to put it. If he makes a tender and does not have some cutoff point then he does not know whether he has the stock to go ahead with it or not and it puts him in a bad situation and you are talking about some price fluctuations. In fact, I would love for someone to make an offer every 30 days for our corporation with no intention of purchasing it because I can assure you I would benefit from it or know how to.

Mr. COHEN. I suppose the fellow who did it for that purpose would probably wind up in some jail.

Mr. STUCKEY. What I am saying is we are leaving this open for this to happen.

Mr. COHEN. No, sir. I don't quite agree. As I indicated earlier, and this deals with both points, and I want to repeat what I said earlier, many more offers are made by stock for stock exchanges which require the filing of a registration statement with the Commission.

Mr. STUCKEY. And you have 20 days.

Mr. COHEN. That is right, and sometimes a little longer unfortunately. Then the offer is out for a specified period which is specified in the prospectus. During the first 20-day period no price is fixed at all in the sense that the terms of the security are not firmed up. Usually it is fixed at the very end of the 20-day period.

I don't see the distinction between the cash tender offer and the stock for stock exchange offer and yet the rules are different. Nor do I see that the situation of the company or the offeror, or, say, proxy contestant is different than exists in the proxy contest. You are seeking votes and you do get proxies but you don't know how many have been rejected or torn up or replaced by later dated proxies given

to others. This is a facet of this type of industrial warfare. Really it is the hard economic facts which make them possible. They see what the market is and what the price is and they know pretty well what is going on if they have the information necessary to arrive at a judgment.

I don't think that is that kind of problem. I want to emphasize that this is not a problem for the company. If it is a problem, it is for the offeror, and, therefore, I sympathize with any proposal which would equalize that situation. But, I think that, in trying to take care of either the company or the offeror, we have to remember that the exercise here is to protect the investor. I used the word pawn. Maybe that was injudicious but he does become the person to which this whole game is directed and he is the one who should have a fair opportunity to make a choice.

Mr. STUCKEY. Mr. Chairman, I think we are doing this but I also think we have an obligation to the corporations of the United States.

Mr. COHEN. I could not agree with that more.

Mr. STUCKEY. I think that really we could be working with a long extension of time to where it works to a disadvantage to the person making the offer, the tender.

Mr. COHEN. I think there is a cutoff point of 60 days in any event.

Mr. STUCKEY. I think with 60 days you have some problems but this is just a matter of opinion.

Mr. COHEN. I don't want to belabor the point but I want to re-emphasize as I stated at the very beginning that although we have some difficulties with the Senate bill the legislation is important from the point of view of the investor that if the committee decided to adopt S. 510 in lieu of H.R. 14475, and there is one change that I understand no one has objected to and that relates to the closed end investment company which was an inadvertence, certainly there would be no problem from the Commission.

Mr. Moss. Mr. Keith would like to have your views, Mr. West.

Mr. WEST. I think we should keep in mind that this bill is intended to cover in principle cash tender offers, not exchanges of securities that might take place and be registered under the 1933 act, although there is a provision here to cover that as well. With a cash tender offer that means we are talking in terms of millions of dollars—that the corporation, or whoever is making this tender offer, must be prepared to put up that cash, because it is a firm commitment. And since it is a cash tender offer, the regulations will be fairly simple under the circumstances. I feel certain that any corporation that is going to make a cash tender offer will have the regulation of the Commission very much in mind when it puts out an announcement. The only thing we are speaking of is this 5-day confidential treatment, you might say which, undoubtedly, if it passes, is going to have an effect on the market. Therefore, since all that represents is the possibility of embarrassment, as Chairman Cohen indicated, to the company making the cash tender offer—the Commission has to go after him because he did not disclose something—I think that immediate publicity of the tender offer is preferable to any embarrassment to the person making the offer. With the registration under the 1933 act, in practically every offer that I have seen, the terms of the exchange offer have been publicly stated before any registration statement is filed with the Commission, so that the public is on notice. And it has been disclosed what this

is intended to be, and what effect it possibly might have on the market, so that under these circumstances the market can continue, and there is no necessity of holding up trading even for a temporary period of time.

I think this is the problem to which we are directing ourselves.

Mr. STUCKEY. Would the gentleman yield for one short time.

I think the two statements by Chairman Cohen and you, Mr. West, really clarify it because I think the past shows that we have not had any trouble with stock for stock offers.

Mr. COHEN. We have.

Mr. STUCKEY. Basically it has been fairly smooth.

Mr. COHEN. The reason for that is that there is an advance filing with the Commission and the materials are scrubbed up before they are actually used.

Mr. STUCKEY. But we are talking about two completely different situations, where with the cash for the stock offer we have had some problems, and I appreciated the two statements in bringing out the difference in basically what we are dealing with here. But basically over a period of time there has not really been too much of a problem as far as the SEC has been concerned with stock for stock.

Mr. COHEN. I think Mr. West at the very end really put his finger on it. We are not insisting on the 5-day provision because we want to have the first look at it. I think this business about rumors is beside the point. There always have been rumors and the clippings that the chairman introduced earlier today I think will make eminently clear that it is true today even when there is no SEC in the picture. I think that our concern really stems from our sensitivity that the Government should stay out of involvement in these contests as much as possible. We recognize that if materials are filed and we have to take exception to them this is embarrassing to the people who used them and, therefore, may interfere with an objective consideration of the merits by the shareholders. That is all that is involved.

If it is felt that the people who do these things should suffer whatever consequences flow from whatever they file, so be it. We just did not want the Commission to be in the position perhaps of compelling changes or going to court because once you do that no matter how well you qualify what you are doing it is going to be used by the other parties as an argument that "The Government is against you." This is the reason why the Commission hesitates, unless no other course is possible, to go to court on these situations. That is why in the present proxy rules which relate to as important matters as this, mergers, consolidations, reorganization and recapitulations which are very, very important from a dollar point of view to all investors, there is a requirement that material be filed with us before it goes to the public.

Mr. MOSS. Mr. Keith.

Mr. KEITH. I would like to ask the triumvirate here just briefly the answers to these two questions. How often are these matters informally discussed with the SEC? Prior to their actually—

Mr. COHEN. When it is a stock for stock exchange offer it is always discussed with the SEC. In a cash tender offer there is no discussion. If it has happened, it has not come to my attention.

Mr. KEITH. The attorneys doing this kind of business.

Mr. MOSS. Do either of the other gentlemen have a comment?

Mr. CALVIN. Would you like to hear Mr. West's reply?

Mr. WEST. Sometimes they discuss it with us on a confidential basis in the first instance because of the time period. This 10-day period, for instance, for pro rata, which we have absolutely insisted upon many of the offerors want to reduce that period, let's say, to 7 days because of the commitments they have. They want to know exactly where they stand and where their commitments will follow, and we have refused to accept that. With the 10-day period for the pro rata, this is relative. We found that, by and large, it gives everyone in the United States an opportunity, with our rapid means of communication today, to know about the offer and make a decision. Because we also go after the management of the company and say, "You must make a statement to your stockholders, and we feel you should notify them as well that this tender offer is present." And, therefore, the stockholder will have an indication from the other side of the picture, whether the management is willing to go along with this tender offer and feels it is good or whether they have something else in their mind and will make a statement and feel that the price is too low.

We feel this should be done and is fair to the security holder.

Mr. KEITH. Just a minute, Mr. Cohen. You almost made me forget what I was going to say. I think the point I was going to make is would you not under S. 510 have sufficient authority to cause considerable embarrassment to those involved in any violation of the spirit of the law which we are considering?

Mr. COHEN. After the event. Yes.

Mr. KEITH. They learn darn fast.

Mr. COHEN. Let me explain. I have to, Mr. Keith. You want a full answer, I know.

Let's assume there is a 10-day withdrawal period, and that we got the materials the very same day they were filed, and examined them. By the time we crank up this machinery to try to get them changed, the 10 days would have run and people are locked in and we don't have any power to compel people to unlock the door. But I don't want to belabor this. I think the point has been made well that the stock exchange does get the benefit of a 5-day prefilng period. I don't know what the objections are to the SEC getting it.

Mr. KEITH. I know what you would do. You would make a speech somewhere and scare them all and it would be taken care of.

Mr. COHEN. Mr. Keith, I know you mean that in jest because I never do that.

Mr. WEST. When they have seen us it has been the night before and we have pounded the table at 8 o'clock at night and the tender offer was made the next morning. So it was not a 5-day period or otherwise. It has been the problem purely of the period to be covered in this relationship and we felt stockholders should be served.

Mr. MOSS. Mr. Stuckey.

Mr. STUCKEY. I think all my questions have been answered, Mr. Chairman, and I appreciate the remarks of Mr. Calvin and Mr. West, and, of course, Chairman Cohen.

Mr. MOSS. Mr. Watkins.

Mr. WATKINS. I have no questions, Mr. Chairman.

Mr. MOSS. You quite obviously would like to make further observations and I think you are entitled to equal time.

Mr. CALVIN. Thank you, Mr. Chairman. I agree with the point of Mr. Keith's last question and this is what we at the exchange call moral suasion. If these people know that if they don't meet the requirements imposed by the Commission, they are going to have trouble with the Commission later, that might prove not only embarrassing but disastrous to this particular offer. They are going to do their utmost to see that they meet the requirements before they make the final decision and make the public announcement. I would like Mr. West to comment on delays in trading which is important throughout all of this and particularly if you do report out H.R. 14475. I would call on Mr. West for that.

Mr. Moss. Mr. West.

Mr. WEST. Chairman Moss, in the past year we have held up trading in 290 stocks in relation to important pending announcements. What we do is to advise companies that they should make immediate disclosure of any matter which affects security decisions or might affect security prices. And we urge them—prior to announcement, as soon as the board of directors has taken any action—that they call us on the phone at the same time they are releasing it to the news services, Dow Jones, and others, and let us know about it. When they do that we immediately call the floor. I have a direct line to the floor and I say "Stop trading in the XYZ stock pending a news announcement." If we hold up more than 20 minutes we send a notice over the tape that we have halted trading pending a news announcement because Dow Jones does not get it out as quickly as we would like because it comes from all over the country. We hold trading until the news announcement does appear on the broad tape, and wait at least 15 minutes, if not longer, to permit the price of the security to adjust the price before we commence trading again.

Then we have problems as well of leaks and rumors that may occur from time to time. In the recent takeover of Jones & Laughlin Steel we had to hold trading in J&L stock until an announcement could be made in relation to the price at which they were going to make the tender offer, because there were rumors. Because of those rumors of the tender offer, and it appeared from both sides that they were sitting down and discussing it, they could say that they were going to have an offer but could not give the price.

We thought there should be no trading on the exchange until they could announce the price, until investors could be informed. This meant holding trading for a day and a half, which in reality was a disservice to security holders, to take away their market for such a long period of time. We are trying to take steps to see that something like that does not happen in the future.

This is the first time we have had to hold it up that long. We have had to hold it up on occasion for 2 or 3 hours but not a day and a half.

We are going to do our best to keep that from happening. How, I don't know. This legislation will be very helpful, providing immediate publicity is given to a decision in these matters so that the public knows about it.

Mr. Moss. Mr. Calvin, do you have further comment?

Mr. CALVIN. No, I do not; just to thank you, Mr. Chairman, and the members of the committee for your time and attention. I hope we have stated the issues. I think you have seen them.

Mr. Moss. I think you have been very helpful and certainly demonstrated the facts, in the two areas of particular concern with emphasis on the one area of the disagreement between the texts of the Senate bill and of the bill which I offered, of the depth of your feeling and of your concern. I assure you the subcommittee will give most thoughtful consideration to those views when we mark up the bill which I hope will be at a very very early date. We would like to move. I also have a feeling of urgent need for one or the other of the bills. You have no adverse feeling at all toward the proposal in 14475 covering the closed end investment.

Mr. CALVIN. None at all.

Mr. Moss. You do not address yourself to that point of difference.

Mr. CALVIN. We have no problem with that at all.

Mr. Moss. The two that you have carefully defined for the committee constitute the only two areas of concern.

Mr. CALVIN. That is right. We have some problems with some other sections of the bill, but we are willing to waive those.

Mr. Moss. Thank you.

Mr. WEST. We might add that we thought the investment companies were covered under the original bill. I am sorry to admit that.

Mr. Moss. I believe Chairman Cohen has identified that as an inadvertence and I am confident that that was the case. I ask unanimous consent at this time that the record receive the communications addressed to the committee on this subject.

Is there objection? Hearing none, it will be so held and the committee is now adjourned.

(The following correspondence was subsequently submitted for the record:)

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., June 18, 1968.

HON. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am enclosing a staff report of our investigation into the unusual trading situation in Chicago and North Western Railway Company stock on August 7 and 8, 1967. As you will note, the report concludes that, although certain technical violations are attributable to the specialists in the stock, such activity was not the cause of the substantial price drop in the securities. We have sent the attached letter to the New York Stock Exchange, requesting the Exchange to take steps to insure that openings will be properly supervised, and, if necessary, delayed until an accurate and complete evaluation of the market is possible.

Sincerely,

MANUEL F. COHEN, *Chairman.*

MEMORANDUM PREPARED BY THE DIVISION OF TRADING AND MARKETS IN RESPONSE
TO A COMMUNICATION FROM THE HONORABLE HARLEY O. STAGGERS

The Commission staff has completed its investigation into certain aspects of the trading in the securities of Chicago and North Western Railway Company on August 7 and 8, 1967. Briefly, the facts were as follows: on August 8, trading in the common and preferred¹ securities of Chicago and North Western Railway Company (C&NW) on the New York Stock Exchange (NYSE) was opened on the closing bell, down 39 points from the previous day's close; the specialists involved in this opening were ultimate net short-sellers of 1,900 shares. (Trading on August

¹ The preferred is convertible into the common on a share for share basis.

7 had been halted at 1:55 P.M. because of the heavy influx of orders following a news release that merger negotiations between C&NW and Essex Wire Corporation had been terminated.)

In the course of its inquiry, the Commission staff interviewed the specialists and Exchange Officials² directly concerned with this opening. Upon our request, the NYSE submitted a detailed report of its investigation into this situation. The Commission staff acquired copies of all market order slips left with the specialists on August 8, and a copy of the specialists' book at the time of the opening showing all limit orders left with the specialists for execution. (A limit order is an order to buy or sell a stated amount of a security at a specified price, or at a better price, if obtainable after the order is represented in the trading crowd.) There are no records of the condition of the specialists' book at any time other than 2:00 P.M.

ANALYSIS OF ORDERS AT THE DELAYED OPENING, AUGUST 8, 1967

Analysis of orders and the specialists' book shows that at the time of the 2:00 P.M. opening, the specialists had market orders to buy 21,400 shares and to sell 14,900 shares of common stock. In addition, the book showed that, up to a price of 150, limit orders to sell totaled 77,400 shares of common. Most of the limit orders to sell (58,800) were at 130 and above. Limit orders to buy on the book totaled 65,200 shares (common) down to a price of 108. The majority of the limit orders to buy, however, (49,800) were at 119¼ and below. Therefore, in order to utilize the limit buy orders on the book to support the price, the specialists would have had to open the stock below 120. If the stock had opened at 130 or above, the specialists could have been obligated to buy slightly more than 50,000 shares (net). Between the prices of 120 and 130, limit orders to buy at 120 and above totaled 15,400 shares, 6,600 of which were at 120. Limit orders to sell below 130 totaled 18,600, 12,200 of which were at a 125 limit. Thus, this placement of limit buy and sell orders indicates that the specialists would have been encouraged to open the stock below 125 in order to match as many buy and sell orders as possible, and to avoid the last of the large limit sell orders on the book (i.e., 12,200 at 125). Adding to the difficult situation in the common stock was a great imbalance in the limit orders in the convertible preferred (17,700 to sell; 100 to buy). The opening price of the preferred would be approximately the same as that of the common due to the share for share conversion ratio.

Exchange rules do not require any particular rate of specialist participation; specialists, however, are expected to maintain a fair and orderly market and not to participate when this would be detrimental to the market. The placement of the buy and sell limit orders, outlined above, created price levels which would have demanded an extraordinary investment by the specialists should they have opened above any of these levels. For example, the staff estimates that the specialists would have had to buy (market and limit orders of common and preferred combined) the following approximate amounts at the following prices: 125—approximately 23,000 shares (\$2,875,000); 130—approximately 60,000 shares (\$7,800,000); 135—approximately 72,000 shares (\$9,720,000). Therefore, barring such an extraordinary investment on the part of the specialists, the placement of these orders indicates the probability of an opening below 125 and above 115. At these levels, the specialists could expect to more nearly match buy and sell orders and to participate as buyers for between 8,000 and 10,000 net, requiring an investment of approximately \$1 million.

About a half-hour before the opening, a price range of 110 to 125 was circulated to the trading crowd; at this range, the specialists were to have been estimated buyers of up to approximately 10,000 shares. In response to this circulated price range, a great number of new orders was received (especially orders to buy), and some existing orders were altered (in particular a 10,700 share market order to sell was changed to a limit order at 130—in the confusion no one handling the book was aware of this change until *after* the opening had taken place). In other words, following the circulation of the price indications, the character of the market began changing rapidly from one with an excess of sell orders to one where buy orders predominated. Due to the confusion, however, no one in charge of the book was aware of the changing character of the market. It does not appear

²Although Floor Officials are responsible under NYSE rules for supervising Floor procedures, in practice Floor Governors participate in serious situations. The term "Exchange Officials" in this report refers both to Floor Officials and Floor Governors.

that Exchange Officials contemplated delaying the opening; on the contrary, all those interviewed indicated that they considered it imperative for each stock to be opened every day, if possible, and that a full day's delay for this opening, even with the prevailing confusion, would not have been appropriate.

Thus, in an atmosphere of considerable confusion, Exchange Officials allowed C&NW common and preferred to be offered at 120, relying on the "educated guess" of the specialists that they would be buyers. The specialists were ultimately made short-sellers on balance of 4,800 shares. Conversion of all of the preferred stock owned by specialists would have left them short a net 1,900 shares. It is the view of the Commission staff that this violation was technical in nature and based on inadequate information concerning the nature and amount of all of the orders at the time of the opening. In the opinion of the staff an exact count of these orders would not necessarily have materially changed the opening price; after-the-fact analysis shows that the short selling violation could have been avoided without a significant change in the investment projection of the specialists had the re-opening price of C&NW been 1 to 4 points higher.³

At present, Exchange Rule 47 allows Floor Officials to supervise and regulate active openings. Under Exchange Rule 79.30 transactions made at 2 points or more away from the last previous sale (for stocks selling at 120 or more) may not be published on the tape without the prior approval of a Floor Official. Since 1965 the Exchange has had a written policy which clearly outlines procedures to be followed at delayed openings. This policy requires that Floor Officials have an accurate count of all orders on the book and in the crowd before the opening may take place. The delayed opening form filled out for C&NW, supposedly to aid the Officials in obtaining a count, contains very little of the necessary information. (Interviews indicated that, according to standard practice, this form was not filled out until after the opening had taken place.) Had the Exchange Officials obtained the required count, they would have had knowledge that the opening would cause the specialists to commit a short-selling violation; the Officials, under such conditions, could not have permitted an opening to take place.

The Exchange Officials decided the opening would be held on the closing bell, even though the specialists testified that they would have preferred an opening which allowed them some time to trade, and even though the Officials knew by the time of the opening that it was impossible to obtain a count of orders and were relying on the specialists' "educated guess." Had an accurate count been obtained, Exchange Officials would have been faced with two choices: they could have changed the opening price, or they could have delayed the opening to the following day. Exchange Officials, however, allowed the opening to occur at 120 on the closing bell, estimating that the specialists would still be buyers of 10,000 shares at this price. Our analysis supports 120 as the best estimated price under the circumstances of the opening, barring an extraordinary investment on the part of the specialists. The specialists performed adequately according to what the Exchange asked of them. It is our view, however, that the opening should not have taken place under circumstances where it was not possible to determine the extent of the specialists' commitment. Indeed, in this case the estimate was incorrect and resulted in an inadvertent violation of the short selling rules. A delay to the following day would have clarified the situation, permitted a more careful evaluation of prices by the public and others, and in all probability, avoided a short selling violation.

³ In its memorandum concerning this reopening, the Exchange stated that at an opening of 120½ the short selling violation would have been avoided. Our interviews with the specialists and Officials, however, revealed that a price of 120½ would never have been selected; securities of the price and volatility of C. & N.W. are characteristically traded in whole or half point differentials. One specialist indicated that he viewed this as a bit of hindsight technical analysis on the part of the Exchange; he stated that he would not have opened C. & N.W. at 120½ simply to avoid 6,600 shares of buy limit orders.

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., June 26, 1968.

HON. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of June 20 with further reference to the activity in the stock of Chicago and North Western Railway Company on August 7 and August 8, 1967.

Without expressing a conclusion as to whether anyone was guilty of improper conduct in the particular case, I agree with you that situations of this kind are extremely disturbing. The tremendous drop in the price of this stock dramatically illustrates the harm which could be done by inadequate or misleading disclosures with respect to mergers and takeover bids.

I also believe that existing controls in this area are inadequate. In the first place, it was held in *Mills v. Sarjem Corp.*, 133 F. Supp. 753 (D. N.J., 1955), that a person making a tender offer has no affirmative duty to disclose to the people from whom he is buying, material information known to him and unknown to them, this on the ground that a takeover bidder is not an "insider." In the second place, the law with respect to misleading corporate announcements is unsettled if, as is commonly the case, the corporation making the misleading announcement has not itself been trading in securities. A majority of the district courts which have considered the question have concluded that the antifraud provisions of the Securities Exchange Act do not apply because the misleading announcement was not issued "in connection with" trading in securities by the corporation. We believe that this is too narrow a construction and have taken that position in connection with appeals in three cases now pending in the Court of Appeals for the Second Circuit. It appears that the Court is having some difficulty with the question, since two of these cases were argued 15 months ago and are still undecided.

Enactment of S. 14475 or S. 510, both pending in your Committee, would result in a substantial improvement in this situation. These bills would impose certain affirmative duties of disclosure on the part of persons making takeover bids. They would also prohibit any person from making false or misleading statements or engaging in fraudulent, deceptive, or manipulative acts or practices in connection with tender offers, or solicitations for or against tender offers. This would resolve the existing unsettled state of the law in connection with corporate announcements in this field. I believe, and have testified in the Senate, that there is a need to correct the existing gap in investor protection in this area. Your letter illustrates the possible operation of this gap in a particular case.

Sincerely,

MANUEL F. COHEN, *Chairman.*

(The following material was submitted for the record:)

STATEMENT OF RALPH W. HEMMINGER,¹ REPRESENTING THE CHAMBER OF COMMERCE
OF THE UNITED STATES

The Chamber of Commerce of the United States appreciates the privilege of presenting this statement to the Subcommittee on Commerce and Finance as its studies proposed amendments to the Securities Exchange Act of 1934. The National Chamber is the largest association of business and professional organizations in the United States, and is the principal spokesman for the American business community. The Chamber represents 3,700 trade associations and local chambers of commerce. It has a direct membership of over 33,000 business firms and an underlying membership of approximately 5 million individuals and firms.

This statement is directed solely to a discussion of one proposed subsection of the bill (H.R. 14475-S. 510). The bill contains a new subsection (e) to be added to Section 13 of the Securities Exchange Act of 1934. Paragraph (1) of new subsection (e) provides that it "shall be unlawful for an issuer, to purchase any equity security which it has issued in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or in order to prevent such acts and practices as are fraudulent, deceptive, or manipulative." Paragraph (2) thereof, however, would define a purchase by the issuer of its own securities to include a purchase by "any bonus, profit sharing, pension, retirement, thrift, savings, incentive, stock purchase, or similar plan of the issuer."

¹ Ralph W. Hemminger, Senior Vice President of Bankers Trust Company of New York.

We oppose the inclusion of "any bonus, profit sharing, pension, retirement, thrift, savings, incentive, stock purchase, or similar plan of the issuer" in the new subsection (e) (2). This subsection was not included in the original Senate Bill (S. 510) and is not pertinent to the purposes of the bill.

This statement emphasizes the harmful effects of subsection (e) (2) on employee benefit plans and summarizes briefly some of the existing law that is already applicable. We recommend that the phrase "any bonus, profit sharing, pension, retirement, thrift, incentive, stock purchase, or similar plan of the issuer" be eliminated. If this phrase of the subsection is not eliminated, then we recommend that the Bill exclude from regulation by the Commission, through its rules or otherwise, the purchase of stock by employee benefit trusts by a trustee that is independent of the employer, such as a corporate trustee, and where the trustee performs the function of purchasing the stock at its discretion without any direction or instructions of the employer.

HARMFUL EFFECTS OF SUBSECTION (e) (2) ON EMPLOYEE BENEFIT PLANS

The Securities Exchange Commission has already drafted rules and regulations (Rule 10b-10) which it proposes to apply under this legislation. The indiscriminate application of such rules and regulations and the general application of private letter rulings, which the SEC has already issued without the authorization of Congress as set forth in S. 510, would interfere with the orderly accumulation of stock for employees in many profit sharing, savings and stock purchase plans. In addition, the rules and regulations could tend to increase the price of the stock paid by the employees and the price that a pension trust may have to pay for stock.

Employee savings plans best illustrate the harmful effects to which we refer. The employee savings plan is currently one of the fastest growing types of employee benefit plans. These savings plans are very popular with both union and non-union employees. The employer contributions have given employees a very real incentive to save and to accumulate funds which are available at retirement, or for disability, family emergencies, or death, and for other personal circumstances. This growing and valuable employee benefit is good for the employee, the employer and the economy.

The plans usually make available employer stock as one of the investments for the employees' account. Incidentally, if any employee contributions are invested in the employer stock the plan is registered with the SEC and the employee is periodically given a detailed prospectus.

It is estimated that savings and similar plans that make available employer stock as one investment medium cover over 3,000,000 employees. The employee funds and the company contributions are usually turned over to the trustee from time to time throughout each month and the purchase of the employer stock that is required is bought on a dollar averaging basis throughout the month. The price paid by an employee for his stock for the month is the average cost of all stock purchased during the month.

The effect of SEC's proposed rule 10b-10 and of SEC's private letter rulings on the savings plans used for this illustration is as follows:

1. The amount of employer's stock which a plan purchases in any week may not exceed 10% of average weekly volume in the four calendar weeks preceding the current week, and the amount of employer's stock purchased in one day may not exceed 15% of the average daily volume in the four calendar weeks preceding the current week. This is an undesirable arrangement, since it limits the stock that the trustee may purchase in two ways: both by the percentage rule applying to total purchases and by the amount of employer purchases.

2. In addition, all purchase orders of the employer and the trustee in any day must be placed with the same broker or dealer. This means that the trustee can lose control of the executions. It can deprive the trustee of the ability of supervising the buying of stock throughout the day and of using his discretion in an effort to obtain the stock at the best price for the trust. It also raises questions as to potential discrimination by the broker both as to amount and price in the allocation of shares to the employer and the trustee.

3. The price limitations in the proposed rules also create problems. The trustee should have discretion to purchase the required amount of stock at such prices as he regards as reasonable. In a rising market, the proposed rules on price might prevent the trustee from buying any stock or, at least, reduce materially his

ability to buy stock even when the employer is not buying stock. The trustee should not be limited to the last independent bid price or the last sales price.

4. If recent SEC private letter rulings are made applicable on a general basis, the trustee would not be permitted to buy when the employer is prohibited from buying employer stock. This could include periods in which mergers or acquisitions are being negotiated which involve the employer's stock, and periods in which the employer may be selling new stock or convertible securities. It is not to be expected that a trustee making its own independent investment decision would be informed of the beginning of merger negotiations. It is not logical for such a trustee to suspend purchases for employees during such periods, which may be lengthy.

The above illustrates the effect of the proposed rules and regulations on savings plans. The effect in a profit sharing plan where the employer stock is purchased for an employee's account is similar. In a pension plan, the employer stock, when purchased, usually becomes part of the portfolio and stock is not bought for the account of individual employees but for all employees as a group. The proposed rules and regulations and the general application of the private letter rulings would actually prevent the trustees from performing their duty, which involves buying the employer's stock at such time, at such price and in such amounts as may operate to the greatest benefit of the trust beneficiaries.

EXISTING LAW AND REGULATIONS

We urge the Subcommittee to recognize that all qualified pension trusts, profit sharing trusts and savings plans trusts are true trusts. They involve a fiduciary relationship in which one person holds title to property subject to an equitable obligation to preserve and use the property for the benefit of other persons. It is not an ordinary business relationship, but a *fiduciary* relationship, in which the law charges the trustee with certain duties: to preserve the trust property and to make it productive, and to use such reasonable care as an ordinarily prudent man would in investing and reinvesting the trust property. The trustee's duty of loyalty is to the beneficiaries for whom he holds the property.

There is already an abundance of controls over these trusts. All qualified trusts are required to report the details of purchases of employer securities to the Internal Revenue Service. An improper purchase can result in the severe penalty of the loss of the tax exempt status of the trust. In addition, under the Welfare and Pension Plans Disclosure Act, the details of the purchase of employer securities must be reported and this information is available to the Secretary of Labor and the public. Furthermore, Congress is currently considering a Federal Fiduciary Responsibility Act for trustees under pension, profit sharing and other employee benefits plans (H.R. 5741 and S. 1024).

Underlying all this federal law is the common law of trusts. Under trust law, the loyalty of the trustee runs to the employees and their beneficiaries in these plans. Every transaction undertaken by the trustee must be measured in terms of this loyalty. Any trustee who acts improperly becomes personally liable. Obviously, no corporate trustee can afford the injury that would result to its reputation from improper or irregular acts in its capacity as trustee.

SUMMARY

In summary, the National Chamber recommends the elimination of the phrase, "any bonus, profit sharing, pension, retirement, thrift, incentive, stock purchase, or similar plan of the issuer" from Subsection (e) (2) of S. 510 and H.R. 14475. Alternatively, this subsection should be so modified as to exclude trustees that are independent of the employer, such as a corporate trustee, and where the trustee performs the function of purchasing the stock at his discretion without any direction or instructions of the employer.

The time limitations on this hearing did not afford us an opportunity to present oral testimony on this one subsection which has such serious implications. We will be happy to elaborate further if the Subcommittee desires additional information.

STATEMENT OF JORDAN H. ESKIN, ATTORNEY, NEW YORK, N.Y.

My name is Jordan H. Eskin. I am an attorney at law practicing in New York City. I have been the Chairman of the Stockholders' Committee for Better Management of the *Boston and Maine Corporation*, the securities of which are listed on the New York Stock Exchange. As such Chairman, I conducted a proxy contest with a number of other persons to secure control of the Boston and Maine Corporation ("B&M") at the April 1966 annual meeting, at which time the Committee's nominees received approximately 46% of the vote cast. At the April 1967 meeting the Committee solicited proxies to prevent management from securing a quorum and to stop the election of management's nominees and for a period of almost one week management was unable to secure a quorum. By February of 1968 half of the Board of Directors of B&M was chosen by me and persons friendly to me.

I am making this statement after having experienced two proxy contests and with knowledge of why they are conducted and the problems involved. I have the scars to prove it.

Before your Committee for consideration is S. 510 which deals with three areas or types of transactions:

I. Where any person acquires or obtains the right to acquire beneficial ownership of 10% or more of any class of equity securities registered under the Securities Exchange Act of 1934. [Section 1 adding new subsections (1)-(4) inclusive to Section 13 of that Act.]

II. Where an issuer proposes to make purchases of its own registered equity securities [Section (1) adding new subsection (5) to Section 13 of the Act]; and

III. So-called "Tender Offers" [Section 2, adding new subsections (1)-(7) to Section 14 of the Act.]

I intend to deal only with Area I. There have been many spokesmen who have discussed the other facets of the proposed legislation. I discuss Area I because it contains the provisions that relate to acquisitions of stock on the open market which may lead to the seeking of control probably through a proxy contest.

As S. 510 is presently constituted it calls for amending Section 13 of the Securities Act of 1934 by requiring every person who acquires beneficial ownership of more than 10% of any class of equity security within seven days to send to the management and to each Exchange where the security is traded and file with the Commission a statement containing the following information: (i) the background and identity of all persons involved in the purchases; (ii) the source and amount of funds to be used in making the purchases, and if the purchase involved borrowed funds, a description of the transaction and the names of the parties, except with respect to loans made in the ordinary course of business by a bank; (iii) if the purchasers are to acquire control of the business of the company, any plans which such persons may have to liquidate the business or to sell the assets or to merge it or to make any other major change in its business or corporate structure; (iv) the number of shares of such security which every such person (including his associates) owns and which he has a right to acquire; (v) information as to any contracts, arrangements or understandings with any person with respect to any securities of the issuer. When two or more persons act as a partnership, limited partnership, syndicate or other group for the purpose of acquiring, holding or disposing of securities of an issuer, such syndicate or group is to be deemed a "person" for the purpose of the subsection.

It is my opinion that if the foregoing provisions of this bill are passed by the House of Representatives, and the proposed legislation is enacted and becomes law, such action will sound the death knell for proxy contests. The provisions place additional obstacles in the path of the insurgent and give management even more weapons than it already has with which to fight.

Let us review the specific information required when a person or group has acquired more than 10% of any class of securities and its effect:

(i) In compelling the insurgent to state the background and identity of all persons involved in the purchases, management will have more time, with its greater monetary resources, to analyze and disparage the foe. The 10% figure in stock ownership might be reached by an insurgent many months before the annual meeting, while the filing of a 14B proxy contest form might be effected shortly before an annual meeting. An insurgent, generally with limited resources, is forced into a prolonged war rather than a short contest. Isn't it sufficient that this information as regards proposed directors and participants in the fight must

now be submitted when the insurgent actually elects to conduct a proxy contest? Furthermore, the average Wall Street broker will avoid helping an insurgent, as they already do, because they dislike any filings with the Securities and Exchange Commission. Thus, the vital help from Wall Street will disappear.

(ii) Should the insurgent reveal his source of funds to give management time to pressure the suppliers of such funds to withdraw the aid.

(iii) It is difficult for the insurgent to set out specifically plans to liquidate, sell assets or merge, etc. when not in a policy making position. Such a revelation may impair the corporation's tax planning. The stockholder is protected in any event because any contemplated major change must generally be submitted for his approval under corporate law. This information only helps management which can set up more stumbling blocks for the new group. Management, on the other hand, does not have to reveal its plans in these areas.

(iv) By compelling the new group to reveal its stockholders, management is enabled to assess the strength of the group and to attempt to divide it.

(v) By requiring the new group to reveal, many months before the annual meeting, information with respect to contracts and understandings between the persons with respect to the securities, all of which is required on the 14B form when the group elects to fight, management is again afforded the opportunity to harass the insurgents for a lengthy period of time.

I fail to see how any of the foregoing revelations at the time when a group acquires 10% ownership aids the stockholder whom everyone is trying to protect. Such revelations hurt him because they materially impair a change in control through a proxy contest.

Anyone contemplating the acquisition of control, which may require or result in a proxy contest, must firmly believe that the securities to which he has committed his funds, his time and his efforts are undervalued and that the present management of the company has not been able to bring out, for the benefit of the stockholder, the true values of the company. It is relatively impossible to go forward in any such enterprise unless the prime mover is convinced of this and unless he is able to convince many other people of the wisdom and advisability of this action.

I take the firm position that allowing and even encouraging proxy contests is vital to corporate vitality. Instead of making the task of the insurgent more difficult, legislation should rather make the road easier.

The flow of new ideas and new men into public companies can be achieved by existing Boards of Directors and officers if they recognize the need and act on it. However, public companies often have been lax in doing this. There is frequently tremendous internal resistance to changes.

The other approach is for new men with new thinking to acquire control of a public company. This can be very beneficial to security holders. The term "raider" as sometimes applied to insurgents is a word behind which many incompetent managements have ducked to preserve the security of their own positions. Too often incompetent and corrupt chief executives have been retained in office in order to preserve the security of other management personnel.* Within reason, the average stockholder can do nothing about it unless someone conducts a proxy fight to change the Board of Directors.

There are certain fundamental principals in proxy contests:

(1) In almost all instances, in order to conduct a successful proxy contest, new men with new ideas and vitality must purchase the required stock to gain control. Such a group will not commit money to the enterprise unless it is thoroughly convinced that it can do a better job than the current management and it can reasonably expect to succeed in gaining control.

(2) For an insurgent to wage a proxy contest in which he can hope to prevail, at least 35% to 40% of the stock of the company must be purchased by individuals friendly to him. *This is extremely difficult for a private group to accomplish.* The independent stockholder's vote cannot be relied on.

Proxy contests are extremely difficult and costly. The number of proxy contests conducted compared to the number of public companies is minuscule. Successful contests result in only a small fraction of those conducted. The reason is not that the existing managements are performing so capably, but that the task is onerous and expensive.

*In the Boston and Maine Corporation, in 1966, the President after being convicted of misappropriating B&M corporate property was given a raise in salary and an extension of his employment contract at the time extensions of employment contracts were given to other officers and directors.

It is a problem of the insurgent to equalize management's initial big head start. Management can generally rely on the vote of almost all the existing stockholders since the American investor habitually signs management's proxy almost without reading it, even though (a) the insurgent's plans and action may be in the best interests of the stockholders, and (b) the new group, to evidence its faith in its plans and people, is prepared to purchase millions of dollars in stock and expend tremendous sums in connection with the expenses of acquiring control to improve the security values. The insurgent must use his own funds. He and his volunteer workers receive no salaries for long difficult work. Management can use the corporate treasury and receive salaries during the fight. It can also use the corporate employees to help its cause.

The bill calls for the insurgent to reveal all of his plans to management. These plans can be very valuable. Under the proposed legislation, management can claim the plans, or a modification thereof, as its own, defeat the insurgent, and never carry them out, thereby preventing new people with new ideas from actively proceeding with them and directing the affairs of the public company. Although the insurgent's plans may be beneficial for the company and its stockholders, management will do everything within its power to stop the insurgent from getting control.

In a football contest is one team compelled to give its playbook to the coach of the other team in advance of the game? Is this a way to conduct the contest?

At some point in a corporation's life, changes should be made which can benefit the stockholders. Does corrupt or inefficient management have the right to run down a company during its tenure and not expose itself to loss of control and positions?

I submit that the job of the insurgent is tremendous and can result in substantial benefits to the stockholder of a company which is the subject of a proxy contest. I point to the few successful ones in the past few years: U.S. Smelting, Sunshine Mining, Penn-Dixie.

I do not intend here to detail all of the ways in which a management could defeat an insurgent once it knew that control was in jeopardy when the insurgents reached 10% of the stock. The ways are myriad and management's ingenuity endless (with corporate funds) in preserving its own power, even though it may have limited managerial competence.

The corporate proxy fight starts the football game with management ahead 90 to 10, and the insurgent is on his own 10 yard line. The proposed legislation then compels the insurgent to give his secret plays to the management and to grant management months to watch the insurgent in practice, time to break up the insurgent team and cut off the sources of supply from the training table. Obviously, no football coach would take on the job of coaching the insurgent team under these conditions. If you wish by legislation to end proxy fights, then this legislation should do it. If you wish to give incumbent management the green light to do anything with corporate assets, this will do it. If you wish to keep vested interests perpetually vested, this will do it.

Certainly, most investors who have held their stock through a proxy contest have benefited by virtue of the work, efforts and money of the insurgents. Managements have no monopoly on doing right. The scale should be somewhat balanced so the insurgent has a chance.

Passing this legislation will stop the flow of new ideas into corporations from the outside through proxy fights. I doubt if any self-respecting attorney, after examining the significance of the proposed legislation, would in his professional judgment advise a client who seeks control of a public company through a proxy contest to proceed to purchase stock on the open market. The risk is too great to justify the commitment of time, money and effort. This new legislation would effectively eliminate any possibility of success.

Consequently, the proposed bill should not be enacted into law, or subsections (1)-(4) to be added to Section 13 of the Securities Exchange Act of 1934, as contained on line 6 of page 1 to line 22 of page 5 of S. 510 should be limited to tender offers and invitations for tenders.

I trust that these views are helpful to the Committee and I am glad that I have had this opportunity of expressing them.

STATEMENT OF HERMAN C. BIEGEL AND JOHN A. CARDON,
ATTORNEYS, WASHINGTON, D.C.

This memorandum is submitted by Herman C. Biegel and John A. Cardon in opposition to Section 2 of H.R. 14475 and S. 510 as pending before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce.

The undersigned are members of the law firm of Lee, Toomey & Kent, 1200 18th Street, N.W., Washington, D.C. 20036, and have for over 25 years specialized in the Federal income tax and other legal aspects of pension, stock bonus and profit sharing plans. During that period we have handled all types of legal problems for employers, both large and small, representing a cross-section of American industry.

In view of this experience we desire to bring to the attention of the Committee certain aspects of the proposed legislation which we feel will be detrimental to pension, profit sharing and stock bonus plans if adopted in their present form.

PURPOSE OF THE PROPOSED LEGISLATION

The Bill, S. 510, as introduced in the Senate, was intended primarily to regulate the acquisition of large blocks of the stock of publicly held companies, when control of such companies might be at stake. In particular, the purpose was to regulate efforts to gain control of such companies through tender offers made without sufficient disclosure of the purposes, background, and resources of the persons making the offer. As a corollary, measures were also proposed to regulate counter efforts of corporate insiders to prevent loss of control, by causing their companies to acquire their own stock.

As introduced in the Senate, S. 510 contained no reference to employee benefit plans. In testifying before the Senate Committee on Banking and Currency, Manuel F. Cohen, Chairman, Securities and Exchange Commission, pointed out the problems concerning SEC when issuers reacquire their own securities and then observed that:

"... purchases ... by a welfare or pension fund subject to the influence of the issuer's management, give rise to similar problems. . . ." (Hearings, p. 28)

Section 2 of S. 510 as reported by the Senate Committee on Banking and Currency and Section 2 of H.R. 14475 as introduced in the House of Representatives propose to amend Section 13 of the Securities and Exchange Act of 1934 by adding a new subsection (e). Paragraph (1) of the proposed subsection (e) provides that issuers of equity securities may purchase such securities only upon compliance with rules prescribed by the Securities and Exchange Commission. Paragraph (2) of proposed subsection (e) defines "issuer" for this purpose to include

"* * * any bonus, profit sharing, pension, retirement, thrift, savings, incentive, stock purchase, or similar plan of the issuer."

SEC PROPOSED RULE 10b-10

Although the legislation has not been adopted, the SEC has proposed a rule, designated as Rule 10b-10, to implement the power which would be granted to it by the legislation. Since the full implication of proposed subsection (e) (2) of Section 13 of the Securities and Exchange Act of 1934 can be seen only by an examination of the rules the SEC proposes to issue thereunder, it is relevant at this point to examine briefly the SEC requirements:

(1) *Disclosure*.—Within a reasonable time before any securities are purchased, the issuer must furnish to security holders, or make publicly available, information about: reasons for the purchase, the number of shares to be purchased, the method of purchase, whether purchases will be made from insiders, and whether any prior arrangement exists for the purchase.

(2) *Price*.—If the purchase is made on a national exchange, or the principal market for the security is a national exchange, the price must not exceed the higher of (a) the highest current independent bid price, or (b) the last sale price on the exchange. If neither the specific purchase nor the principal market is on a national exchange, the price must not exceed the highest current independent bid in the existing principal market.

(3) *Volume*.—If the purchase is made on a national exchange, the total volume purchased may not exceed either 10% of average weekly volume on such exchange for the four calendar weeks preceding that of the purchase, or

15% of the average daily volume on such exchange for the same period. In addition, the broker must be instructed to endeavor not to purchase more than 10% of the current week's, and 15% of the current day's volume. If the purchase is made other than on a national exchange, from or through a broker or dealer:

(a) if the principal market for the security is a national exchange, then total purchases in any market may not exceed 10% of average weekly, or 15% of average daily, volume for the previous four weeks on all exchanges; or

(b) if the principal market is other than a national exchange, then total purchases in any market may not exceed 10% of the average weekly volume transferred in the preceding four calendar weeks, as determined from transfer records of the issuer.

Presumably, for purposes of computing the volume limitations, acquisitions by parent and subsidiary groups and their benefit trusts must all be included.

(4) *Use of Brokers or Dealers.*—Purchases on a national exchange may be under the supervision and control of no more than one broker on one day. Purchases not on an exchange must be made by no more than one broker on one day, and from no more than one dealer on one day, unless the issuer establishes that such purchases were not solicited.

(5) *Purchase by Solicitation of Tenders.*—Notwithstanding the foregoing provisions, no purchase of a security by solicitation of tenders would be permitted unless: (a) the same offer is made to all holders of the security or all holders of less than a specified number of shares of the security, (b) the formula for price and number of shares to be purchased is uniform, (c) no special advantages are given to specific holders, and (d) no securities are purchased other than by such tender for a period before and after solicitation and purchase.

CONSIDERATIONS PARTICULARLY APPLICABLE TO EMPLOYEE BENEFIT TRUSTS

In many respects, some of which are hereinafter noted, the proposed rule would have impractical and unduly restrictive effects on any purchases by an issuer of its own securities. We wish to emphasize, however, considerations that are particularly applicable to purchases for employee benefit plans and trusts. Among such considerations are the following:

(1) *Purchases by an Independent Fiduciary or at the Direction of Employee-Beneficiaries.*—In many instances the trustee of an employees' trust is an independent fiduciary, often a corporation. In many other cases employees, who will have an investment position in the stock when purchased, direct the purchases. In either case there may be almost complete independent control over the methods, timing, prices and other conditions for purchase of the employer's stock and no opportunity for the improper influence of management in determining the need and conditions for such acquisitions.

(2) *Large or Recurrent Purchases under Established Policy.*—The terms of many employee benefit plans require the acquisition of large volumes of employer securities in order to carry out their purposes. Although these purchases would be seriously affected by the proposed restrictions, such purchases are not in fact adaptable to the *ad hoc* manipulation that the rule attempts to prevent.

(3) *Multiplication of Regulatory Power.*—The grant of power to regulate the terms and conditions for purchase of an employer's securities would vastly increase the presently somewhat limited SEC control over personnel and retirement policy, without sufficient justification. Employee pension plans that are qualified under the Internal Revenue Code already meet stringent requirements under the tax law. Any investment by a qualified employee benefit trust must be for the "exclusive benefit" of the employees covered. Accordingly, the administrator of a plan would risk loss of the favorable tax benefits for qualified plans if unwise investments were made in employer securities, or if artificially inflated prices were paid. In addition, employee trusts currently are required to disclose their operations, pursuant to the Welfare and Pension Plans Disclosure Act.

Any proposed new legislation that has such far-reaching effects upon the basic operations of benefit plans must deal directly with the complex problems in that area and receive thorough study and discussion in that context. For example, such consideration is now being given to the Administration's recommendations embodied in H.R. 5741 and S. 1024 for establishing Federal fiduciary standards by amendment to the Welfare and Pension Plans Disclosure Act. If those recommendations are enacted, they would also limit investment in securities of employer corporations by certain kinds of plans. Hearings have been held on H.R.

5741 by the General Labor Subcommittee of the House Committee on Education and Labor.

In view of the extensive present and proposed legislation, any extension of this regulatory pattern to reach a peripheral aspect of abuses largely unrelated to the benefit plan area seems unwarranted and unnecessary.

RECOMMENDATIONS

In view of the foregoing considerations, it is unnecessary to extend the legislation and the proposed SEC Rule 10b-10 to purchases of employer securities by employee benefit trusts. We recommend deletion from Section 2 of the pending bills of the proposed subsection (e) (2) of Section 13 of the Securities and Exchange Act of 1934.

If application to employee trusts cannot be entirely eliminated by amending Section 2 of the bills, we recommend that the proposed subsection (e) and proposed SEC Rule 10b-10 be modified as described below to avoid possible adverse effect on the legitimate operations of pension, stock bonus and profit sharing plans. To the extent these modifications cannot be incorporated in the pending legislation, it is suggested that the Report of the Committee clearly delineate the authority intended to be conferred on the SEC so that they may be incorporated in Rule 10b-10 as finally promulgated by the SEC.

(1) *Exemption for Plans Investments of Which Are Not Subject to Control by Management.*—The legislation and the SEC Rules issued thereunder should specifically exempt employee benefit plans in any case where the purchase of employer stock is not subject to manipulation by management. Such an exemption would be perfectly consistent with the following statement regarding the amendment of Section 1(5) of S. 510 filed by the New York Stock Exchange before the Senate Committee on Banking and Currency (Hearings, p. 94):

"The proposed SEC amendment would greatly expand the scope of this provision by including purchases made for bonus, profit sharing, pension and other employee benefit plans.

"As we stated in our testimony, the Exchange believes that the disclosure philosophy of the bill can be served by limiting this requirement to the specific items of information currently set forth in Section 1(5).

"We have no objection to including purchases made for various company benefit plans in the information statement we proposed, but *we would not require truly independent trusts of such plans, who normally make purchases without the knowledge of company management, to file such statements.* The Commission's concern that issuers may use these employee benefit programs for purchasing shares 'under circumstances which have introduced improper influence into the market,' is not applicable to plans administered by independent trustees." (Emphasis added.)

In this connection, reference is again made to the prepared statement filed by Chairman Cohen, a portion of which is quoted on page 2 above, in which he stated that it is plans "subject to the influence of the issuer's management" which give rise to problems similar to those found in purchases by an issuer of its own securities.

Specific examples of where there should be no problem are:

(a) Plans in which employee-beneficiaries direct the purchases of employer stock, and will have an investment position in such stock.

(b) Plans in which an independent fiduciary (corporate or otherwise), or an independent investment committee, control purchase of employer stock. (The mere fact that the employer corporation retains power to remove a trustee should not be regarded as affecting his independence.)

(c) Plans the terms of which specifically require purchase of employer stock, and in which recurrent day to day acquisitions of stock are required to meet plan requirements.

(2) *Exemption for Purchase of a Small Percentage of Average Volume.*—An exemption should be granted for daily purchases that do not exceed some specified small percentage of average volume. Such an exemption would permit relatively small purchases for benefit plans of large companies without affecting market behavior in any way.

(3) *Modification of Price Requirements.*—The price restrictions of Rule 10b-10 would severely limit an employer's ability to acquire stock needed to meet plan commitments in a rising market. Moreover, in some situations—for example, where securities are not actively traded or where purchases are being made in different places and in different markets by an issuer, its subsidiaries and

affiliates—accurate determination of maximum prices within the prescribed limits would be almost impossible. The price rules are extremely impractical and must be changed.

(4) *Modification of Volume Requirements.*—Where purchases by benefit plans are recurrent, are within volume limits established over a significant period of operation and are needed to maintain the established plan requirements, the volume restrictions should not apply or should be made considerably more liberal. Indeed, if the present restrictions found in Rule 10b-10 were put into effect, *it would be impossible for employee benefit programs of many employers to acquire sufficient stock to meet their obligations.* Again, the effect is particularly acute when the combined needs of large companies and their affiliates and subsidiaries are taken into account. As minimum improvements, (a) the volume restrictions that refer to average volume for previous weeks should be modified to permit acquisition of stock at the time of an *initial* offering. (b) the 10% limitation should be raised to 20% of a week's volume, without a daily volume limitation, and (c) any percentage limitation for total purchases on exchanges and otherwise should be applied to total volume, not just the volume on all exchanges. Additional revisions are required to permit purchase of large blocks of stock at bargain prices.

(5) *Modification of Broker and Dealer Rules.*—The rules limiting the use of brokers and dealers should be modified to accommodate market practicalities, without permitting manipulation. For example, unsolicited purchases from dealers must be permitted. In addition, adjustments must be made (under appropriate safeguards) to permit purchases by more than one broker when large volume acquisition are necessary to meet plan commitments (including the combined commitments of affiliated parent and subsidiary groups).

(6) *Modification of Disclosure Requirements.*—Disclosure in a proxy statement, or in an annual report, of planned regular purchases in the future, should be regarded as fulfilling the requirement for information "furnished" in a "reasonable time" to security holders. In addition, if an issuer furnished the required information to the SEC in an annual 10-K report or in an 8-K report, such information should be regarded as fulfilling the alternative requirement to make information "publicly available".

(7) *Modification With Respect to Inclusion of Subsidiaries.*—Throughout the foregoing discussion, the impact of the proposed rule upon benefit plans of large, geographically disparate groups of parent and subsidiary corporations has been mentioned, but the modifications of the rule suggested herein do not begin to solve the staggering problems involved. Even if it were possible for the administrator of one of the many plans of affiliated corporations to determine the number of shares being acquired by all the others, and to determine the prices and number of brokers involved, numerous questions would remain.

For example, if a parent and its subsidiaries each needed employer stock for their respective plans and one or more such companies also needed stock for purposes unconnected with employee benefit plans, how would the choice among these needs be made? If, through inadvertence or failure of communication, the total volume limitation were exceeded, which corporation or trust in the affiliated group would be deemed to have violated the rule?

Consideration also must be given to the acquisition of employer stock by foreign subsidiaries. Certainly, purchases by such subsidiaries on foreign exchanges not regulated by the SEC should not be covered by the rule. Even if this were done, the coordination of international pension plan operations would be almost impossible under the proposed rule.

In summary, the provisions of the legislation and rule which lump together purchases of parents, subsidiaries and all their benefit plans must be drastically modified.

(8) *Other Modifications.*—Rule 10b-10 should not apply to debt securities, since the purposes of the legislation are relevant primarily to equity securities, and the relevant part of the Williams Bill refers only to equity securities. In addition, the statement required of purchasers by the second sentence of the proposed rule should be eliminated. As presently drafted, that sentence requires purchasers to state not only that the purchase complies with Rule 10b-10 but also that the rule is "intended to prevent the issuer from raising the market price of the security". Such a statement carries the unwarranted implication that, but for the rule, the purchaser might artificially raise the market price.

Respectfully submitted.

LEE, TOOMEY & KENT,
HERMAN C. BIEGEL
JOHN A. CARDON

THE AMERICAN BANKERS ASSOCIATION,
Washington, D.C., July 1, 1968.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Commerce and Finance, House Committee on Inter-
state and Foreign Commerce, Rayburn House Office Building, Washington,
D.C.

DEAR CONGRESSMAN MOSS: This letter is written for the purpose of expressing the views of The American Bankers Association with respect to H.R. 14475, a bill providing for full disclosure of corporate equity ownership of securities under the Securities Exchange Act of 1934.

The American Bankers Association believes that the overall objective of this bill are sound, constructive, and necessary. One specific provision of this bill would however, present serious difficulties for our member institutions in serving as trustees of corporate pension, retirement, and other employee benefit plans. We refer to paragraph 2 of the proposed new subsection (e) which the bill would add to section 13 of the Securities Exchange Act of 1934.

As drafted, this new paragraph (e) (2) provides that a purchase by any bonus, profit-sharing, pension, retirement, thrift, savings, incentive, stock purchase, or similar plan of the issuer or any person controlling, controlled by, or under common control with the issuer, shall be deemed to be a purchase by the issuer and such a purchase would be required to comply with the rules and regulations to be adopted by the Securities and Exchange Commission under the proposed subsection (e). It is our considered judgment that the scope of this provision, as presently drafted, is unnecessarily broad, and that its effect would be to needlessly circumscribe the investment administration by bank trust departments of many corporate pension, retirement and other employee benefit plans.

We do not quarrel with the purposes of this provision with respect to those employee benefit funds where the employer or someone in a control relationship with the employer has the power to control, direct or influence the investments made for an employee benefit fund. However, in many cases—if not most—bank trust departments, serving as trustees for the funds of employee benefit plans, act as full discretion trustees with the unconditional power to make all investment decisions. Were the proposed provision to be adopted in its present form, it would be extremely difficult, if not impossible, for bank trustees to effectively perform their investment responsibilities in connection with employee benefit funds for the ultimate benefit of the plan beneficiaries. This would be especially true in the case of collective trust funds, where the assets of many pension plans are commingled for the purposes of efficient and economical investment administration.

For the foregoing reasons, The American Bankers Association recommends that the language of the proposed new subsection 13(e) (2) be amended so as to narrow its application to only those employee benefit plans, in which the issuer or a person in a control relationship with the issuer exercises control, direction, or influence over the investment decisions for a plan. We earnestly hope that your distinguished Subcommittee will see fit to make this necessary modification in the provisions of H.R. 14475.

Sincerely yours,

CHARLES R. McNEILL,
Director, Washington Office.

AMERICAN LIFE CONVENTION,
Chicago, Ill.
LIFE INSURANCE ASSOCIATION OF AMERICA,
New York, N.Y. July 1, 1968.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Commerce and Finance, House Committee on Inter-
state and Foreign Commerce, Rayburn House Office Building,
Washington, D.C.

DEAR CONGRESSMAN MOSS: The American Life Convention and the Life Insurance Association of America are two associations with an aggregate membership of 353 life insurance companies in the United States and Canada which have in force approximately 92 percent of the legal reserve life insurance written in the United States. These companies also hold over 99 percent of the reserves of insured pension plans in the United States.

We are writing to request a clarifying amendment to paragraph (2) of the new Section 13(e) of the Securities Exchange Act of 1934 which would be added by H.R. 14475 and S. 510. Paragraph (1) of Section 13(e) would make it unlawful for a corporation to repurchase its own securities in contravention of such rules and regulations as the Securities and Exchange Commission may prescribe. These rules may require the corporation among other things, to provide holders of such securities with information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid, and the method of purchase. Paragraph 2 of Section 13(e) would provide that a purchase by or for any bonus, profit sharing, pension, retirement, thrift, savings, incentive, stock purchase, or similar plan of the issuer shall be deemed to be a purchase by the issuer. We believe that paragraph 2 should be modified to provide that a purchase by or for such a pension, profit sharing or similar plan shall be deemed to be a purchase by the issuer only where the issuer "exercises direction, control, or influence over the investments of such plan". A proposed amendment to accomplish this purpose is attached to this letter.

The clear purpose of new Section 13(e) is to provide shareholders of a corporation and other persons interested in the market price of its stock full information regarding the corporation's activities and intentions in repurchasing its own stock. We take no position here with respect to the need for such information. We do seriously question however, the assumption reflected in paragraph 2 of new Section 13(e) that a purchase of the corporation's securities by a pension, profit sharing, or similar plan is always to be considered the same as a purchase by the corporation itself. In the case of pension plans funded by life insurance companies, the issuing corporation will rarely, if ever, have any control or influence whatsoever over the securities purchased by the insurance company. The same is true for many pension and profit sharing plans funded by bank trustees and others. In such cases, there is no need to require the life insurance company, bank, or other funding medium to provide the information specified in new Section 13(e).

We shall appreciate your making this letter a part of the printed hearing record.

Sincerely yours,

AMERICAN LIFE CONVENTION,
WILLIAM B. HARMAN, Jr.,

General Counsel.

LIFE INSURANCE ASSOCIATION OF AMERICA,
KENNETH L. KIMBLE,

Vice President and General Counsel.

SUGGESTED AMENDMENT TO NEW SECTION 13(e)(2) OF SECURITIES EXCHANGE ACT OF 1934, AS ADDED BY H.R. 14475 AND S. 510

"(2) For the purpose of this subsection, a purchase by or for (a) the issuer, or any person controlling, controlled by, or under common control with the issuer, or (b) any bonus, profit sharing, pension, retirement, thrift, savings, incentive, stock purchase, or similar plan of the issuer or any such person, *where the issuer or any such person exercises direction, control, or influence over the investments of such plan*, shall be deemed to be a purchase by the issuer."

NATIONAL ASSOCIATION OF MANUFACTURERS,
GOVERNMENT FINANCE DEPARTMENT,
New York, N.Y., October 31, 1967.

Hon. H. O. STAGGERS,
*Chairman, House Interstate and Foreign Commerce Committee,
House Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: I am writing as Chairman of the Money/Credit/Capital Formation Committee of the National Association of Manufacturers. Quite a few of our members have expressed concern over S. 510 relating to stock acquisition disclosures, which has been referred to your Committee.

The intent of the bill is to impose restrictions on those making tender offers by requiring specific disclosures such as their principals, source of financing, and plans for liquidation or changes in the corporate structure. However, it appears to us that the bill, in the form passed by the Senate, could be one important

respect operate to the disadvantage of existing management of firms for which the tender offers are made.

Paragraph (4) of Section 14 (d), as proposed, reads:

"Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

This might be construed by the Securities and Exchange Commission as a license to require clearance by the Commission of material that management would want to communicate to stockholders in response to a tender offer. The very nature of tender offers, with their relatively short time limit, makes it imperative for management to respond immediately. If SEC clearance is imposed on such representations that management might make, the critical element in delay in virtually all cases would enure to the advantage of the interests making the tender offer.

Our aim is not to hinder the acquisition of stock by any interested party, but rather to ensure that neither party be placed in an unfavorable position by regulatory procedures. Without taking a position on the need for additional disclosure requirements to prevent misrepresentation, the NAM feels that S. 510 in its present form could produce inequities in regulation.

Therefore, if and when this bill is reported out by your Committee, we urge amendment so that it is clearly understood that management material replying to a tender offer may not be subject to delays by the SEC. This would not rule out minimum requirements for such answering materials, but would ensure that no stricter burden be placed on the party in opposition to the tender offer than on the maker of the offer.

The NAM would appreciate your Committee taking these thoughts into con-

Yours very truly,

MAURICE H. STANS,
Chairman, Money, Credit, and Capital Formation Committee.

ARNSTEIN, GLUCK, WETZENFELD & MINOW,
Chicago, Ill., July 1, 1968.

Re H.R. 14475.

Hon. JOHN E. MOSS,

Chairman, Subcommittee on Commerce and Finance, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. MOSS: On behalf of Sears, Roebuck and Co. and the 192,000 Sears employees who are participants in The Savings and Profit Sharing Pension Fund of Sears, Roebuck and Co. Employees, I take this opportunity to bring to your attention a serious problem for employe benefit plans, which H.R. 14475 presents in its present form. I wish to limit my comments primarily to that portion of Section 2 of the bill which would add a new subsection (e) (1) and (2) to Section 13 of the Securities Exchange Act of 1934.

Section 13 of the Securities Exchange Act relates to the "information, documents, and reports" to be filed with the Securities and Exchange Commission by publicly held companies (registered with the Commission under Section 12 of the Act) whose securities are traded in the over-the-counter market or on national securities exchanges. Section 14 of the Act relates to proxy solicitations with respect to securities of publicly held companies. Section 2 of H.R. 14475 would add new subsections (d) and (e) to Section 13 of the Act. Section 3, which would add new subsections (d), (e) and (f) to Section 14 of the Act, relates primarily to the solicitation of tenders and the dissemination of investment information deemed relevant to such solicitations. The first part of Section 2, which would add the new subsection (d) to Section 13 of the Act, similarly seems to be concerned with information which should be made public by persons who acquire substantial stock interests (i.e., in excess of 10%) in publicly held companies. On the basis of the historical record of the SEC's interpretation and administration of federal securities laws, it is not foreseen that the proposed Sections 13(d) and 14(d), (e), and (f) would affect the orderly and proper conduct of the daily affairs of publicly held companies or of their employee plans. No such conclusion, however, may be drawn with respect to the new subsection (e) which Section 2 of the bill would add to Section 13 of the Securities Exchange Act.

For the 34 years of its existence, Section 13 has dealt only with the reporting of investment and corporate management information about publicly held companies. Subsection (e) would depart from this concept and expand Section 13 to confer authority on the Commission to forbid employe benefit plans (including plans such as the Sears Profit Sharing Fund) to continue in the future with the investment policy which, for example, the Sears Fund has followed for more than 50 years, and for which, in fact, it was organized.

Subsection (e) would do two things. *One*, it would authorize the Commission to adopt rules which would make it unlawful for any company (whether or not a publicly held company in the sense of Section 12 of the Act) to employ any deceptive or manipulative practice in the purchase of shares of its outstanding stock. This proposal should not cause concern to any company or any employe profit sharing fund even though subsection (e) provides that a purchase of an issuer's stock by an affiliated employe plan shall be considered a purchase of such stock by the issuer. It may be well, however, to note in passing that this proposal does not seem to add anything to the existing authority of the Commission under Sections 9 (prohibiting manipulation) and 10 (prohibiting the use of deception in the purchase or sale of securities) of the Securities Exchange Act. *Two*, subsection (e) would confer authority on the Commission to forbid entirely (or place quantity restrictions on) the purchase of outstanding shares of stock by the company issuing it or by any employe benefit plan in which that company's employes participate even though such purchases do not involve any acts or practices which are "fraudulent, deceptive, or manipulative" or any of the non-investment management purposes which the Commission's Chairman has mentioned such as "preserving or improving the management's control position" or counteracting "a tender offer or other take-over bid."

To date the only basis advanced before the Congress for this additional authority is the Commission Chairman's assertion that "even where the management has no improper motive in repurchasing securities, substantial repurchase programs will inevitably affect market performance and price levels." This is all, nothing more, no offer of factual information; not even a claim that such market effect is bad or improper, or that purchases by an employe plan of the securities of the employer causes more harm than good and should in the public interest be subordinated to the purchases of other investors, including institutional investors (mutual funds, banks, insurance companies, foundations, or employe plans of other employers) whose substantial purchase programs could also be considered as programs which "will inevitably affect market performance and price levels."

There are many employe profit sharing plans with the basic policy of investing in employer stock for *bona fide* investment management and personnel policy objectives. Yet the proposed subsection (e) would confer authority upon the SEC to adopt rules which would put them out of business in the absence of drastic transformation of investment policy and abandonment of personnel policies deemed desirable. This the Commission could do by stating that such action was in the public interest, presumably without any more supporting evidence than the assertion of the Commission's Chairman quoted above.

Today is the 52nd anniversary of the founding of the Sears Profit Sharing Fund on July 1, 1916 "for the three-fold purpose (i) to permit eligible employes to share in profits, (ii) to encourage the habit of saving, and (iii) to furnish a means for such employes to accumulate their own savings, the employers' profit sharing contributions, and the earnings thereon, to provide themselves with retirement income." Today more than 192,000 employes are participants in the Fund. Throughout the years the Rules of the Fund have provided that the Fund was to be invested so far as practicable and advisable in the Company's stock to the end that participants "may, in the largest measure, share in the earnings of the Company." At December 31, 1967, the Fund held 36,040,698 of the Company's common shares representing 23% of the outstanding stock. Ten years ago, it held 26% of the outstanding stock. To date the operation of the Fund has been of substantial benefit to employes and as a factor facilitating the recruitment and retention of superior individuals as employes has been beneficial to the stockholders who now number more than 257,000 in addition to the 192,000 members of the Fund. Without any effort to show that operation over the years of the Sears Fund and other similar employe plans has, by way of impact on the securities markets, adversely affected the stockholders of the sponsoring employers, the Commission urges that it be given broad authority to in effect terminate or drastically alter these plans.

At this time the only indication we have of what the Commission could be expected to do under the proposed subsection (e) is the Commission's "draft Rule 10b-10" which apparently received some limited circulation for comment among representatives of the organized securities markets in February 1967. Under this draft rule an employe plan's weekly purchases of the employer's stock on the stock exchanges and from other sources through brokers and dealers could not, in substance, exceed 10% of the average weekly volume on the exchanges on which such stock is listed.

Enactment of proposed subsection (e) to Section 13 and adoption of Rule 10b-10 would on the basis of information presented to the Commission's Division of Trading and Markets in 1966 require substantial modification of the dominant historical investment policy of the Sears Profit Sharing Fund. It is believed that the investment management of many other employe plans would be similarly affected.

It would seem appropriate that action on subsection (e) be deferred until the Congress is presented in hearings before the Subcommittee on Commerce and Finance with evidence concerning:

- (i) the number, nature, and importance of the employe plans which will be affected or might be affected by the proposed legislation;
- (ii) the existence of adverse, undesirable or improper effects, if any, on securities markets or on investors attributable to the existence and operation of employe plans purchasing the securities of their employers;
- (iii) the facts, if any, which tend to show that it would be in the public interest to subordinate the investment rights of employe plans to those of other institutional purchasers;
- (iv) the extent to which appropriate and practical disclosure requirements should be considered in lieu of quantity restrictions;
- (v) the factual basis for the Commission's assertion that the problems of market impact in this area cannot be met by a simple disclosure requirement;
- (vi) a detailed analysis and identification of "the problems of market impact in this area";
- (vii) the need for quantity restrictions for issuers not making public offerings of stock or using stock for acquisition purposes; and
- (viii) the need for such legislation prior to completion, and Congressional review of, the projected study of institutional investors.

Respectfully,

LEO H. ARNSTEIN.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
COMMITTEE ON SECURITIES REGULATION,
New York, June 28, 1968.

Hon. JOHN E. MOSS,
*Chairman, Subcommittee on Commerce and Finance, Interstate and Foreign
Commerce Committee, Rayburn House Office Building, Washington, D.C.*

DEAR CONGRESSMAN: This letter is submitted by the Committee on Securities Regulation of the Association of the Bar of the City of New York in connection with the consideration by your Subcommittee of the legislative proposals referred to above. We appreciate the opportunity to present our views.

While their common title suggests a more limited scope, all of the proposals would amend Sections 13 and 14 of the Securities Exchange Act of 1934 ("the Act") so as to provide regulation in situations involving:

- (a) the acquisition (other than by an issuer) of more than 10% or, subject to certain exceptions, increasing an existing holding of more than 10% of any equity security which is registered under Section 12 of the Act;
- (b) so-called "Tender Offers"; and
- (c) acquisitions by issuers of equity securities issued by them (whether or not registered under Section 12 of the Act).

Our discussion will be directed largely to S. 510, H.R. 14475, and H.R. 15567 which are in most respects identical. H.R. 12210 corresponds to S. 510 before it was amended by the Senate.

Our principal comments relate to the proposal, referred to in (c) above, to add a new Subdivision (e) (Subsection 5 in the case of H.R. 12210) to Section 13 of the Act. In our view, this proposal represents an unnecessary and unwarranted departure from the concepts of investor protection which the Federal regulatory power has been traditionally designed to provide. Under it, the power and re-

sponsibility of the Securities and Exchange Commission ("the Commission") are not limited to requiring appropriate disclosures and to guarding against deceptive and unfair devices in respect of the securities of publicly owned companies (i.e., those having equity securities registered pursuant to Section 12 of the Act). On the contrary, it extends to all issuers, public and private, and it appears to give the Commission power and responsibility to pass on the substantive merits of a particular issuer purchase program if in the Commission's judgment it is in the "public interest".

The proposal is broad enough to permit the adoption of rules that would be in conflict with, and would override, the substantive state law which has traditionally governed questions of corporate repurchases of stock and it certainly will permit the Commission to substitute its judgment for that of the issuer's management in the area. Under it, the Commission appears to be given power to regulate the price and other terms of an issuer repurchase, the amount of the repurchase, and the timing and method thereof. On its terms, it arguably is broad enough to permit the Commission if in its judgment it is necessary or appropriate "... in the public interest or for the protection of investors ..." to prohibit repurchases completely.

In addition, the proposals (except for H.R. 12210) introduce the "control" concept in defining issuer repurchases. This concept has a long history under the Securities Act of 1933 and the Commission and its staff have consistently avoided any concise definition of "control". Undoubtedly, this has been a sound approach from the standpoint of protecting potential investors by insuring full disclosure in doubtful cases even though a considerable burden of delay and expense has been imposed on the seller. Admittedly, there is also a disclosure problem in the case of acquisition by controlling persons but it is one of providing full disclosure rather than of restricting disclosure to prevent "overselling". This is an area in which the anti-fraud provisions of the Act already provide the Commission with adequate regulatory powers. And in any event the impact of the regulation should not be dependent on any vague concept of control but on the possession of "inside" information. If regulation of purchases is based on a control concept comparable to that applied under the Securities Act of 1933, it can only serve to restrict the market for outstanding securities to the detriment of the investor who desires to sell.

Finally, the proposals (except H.R. 12210) define issuer repurchases to include purchases by or for various employee benefit plans such as a pension plan, profit sharing plan, and the like. Admittedly, where the purchase programs under such plans are under the direction of the management of the issuer, there would seem no reason why they should not be treated as if they were purchases by the issuer and we understand this to be the case under existing law. However, where the programs are directed by independent entities such as trustees it seems doubtful that the considerations which might be applicable to repurchases by an issuer would have much relevance. More important in view of the substantive powers proposed to be given the Commission, this broad definition can create problems in other areas. For example, in the case of a pension or other plan which is the subject of negotiations with a labor union, the Commission could in effect be a third party at the negotiating table.

To justify the broad grant of new power which this proposal contemplates there should be substantial evidence that real regulatory problems exist. This seems to our Committee not to be the case. There is already a long history of application of the anti-fraud provisions to provide adequate disclosure of information pertinent to an investor's decision to resell his securities to the issuer or an insider. In the area of issuer repurchases intended for the purpose of manipulation of prices, the Commission, on its own statements, has certainly been successful on a case-by-case basis and it has the power under the anti-fraud provisions of the Act to adopt specific regulations to deal with this type of conduct. Finally, even in the case of programs which are admittedly for perfectly proper purposes but which might have an effect on "market performance and price levels", including programs under employee benefit plans operated under the direction of independent trustees, the Commission has had considerable regulatory impact on an informal basis. If the Commission finds that it is necessary or desirable, it has the power to adopt regulations to accomplish its purpose in this area.

Basically, the argument advanced for this proposal seems to be that it would be "helpful". This in our opinion in no way justifies the major extension proposed for the powers of the Commission, particularly when its existing powers are by no means fully exercised.

With respect to the other two proposals, referred to in (a) and (b) above, it is the general view of our Committee that both proposals seem to go beyond any demonstrated need for additional statutory regulation of the kind of transactions to which such proposals relate.

The proposals appear to have been induced primarily by the fact of recent increases in activities in the "tender offer" and "take-over" fields, rather than by any substantial evidence that such activities are undesirable or involve any real threat of injury to investors. The absence of need for a major new statutory scheme of regulation in the areas covered by the proposals would seem to be evidenced by the fact that, in large part, the proposals merely grant to the Commission in a specific context regulatory powers which the Commission already has under more general provisions of the Act, particularly the so-called anti-fraud provisions of the Act. The suggestion sometimes made that the proposals merely fill "a gap in the provisions of" the Act in the area of planned acquisitions of controlling blocks of securities of publicly owned companies is, therefore, not entirely accurate.

We recognize, however, that the desirability of additional statutory regulation in the areas covered by the proposals raises questions of public policy which may not be within the purview of our Committee. Accordingly, except for the foregoing comment, our Committee does not express any view as to the merits of either of these proposals.

We hope that these comments will be helpful in your consideration of the proposals.

Respectfully submitted,

THOMAS A. HALLERAN, *Chairman.*

(The following additional correspondence was subsequently submitted by SEC:)

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., July 9, 1968.

HON. HARLEY O. STAGGERS,
*Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your letter of June 20 with respect to the acquisition and subsequent sale by Crane Co. of a block of American Standard Inc. in connection with Crane's unsuccessful takeover bid. There have been a number of situations of this type in recent months. Essentially, the pattern is that a company accumulates more than ten per cent of the stock of another corporation as a result of a takeover bid, whereupon the company sought to be acquired negotiates what is referred to as a "defensive merger" with a third party, and the unsuccessful takeover bidder acquires shares of the third party in the merger and sells them. This presents the question referred to in your letter as to whether there is liability under Section 16(b) of the Securities Exchange Act, assuming that the original takeover bid and the merger occur within six months, or the sale occurs within six months after the merger, whether or not it is within six months after the original tender offer. There are a number of cases under Section 16(b) pending in district courts in various parts of the country which involve this question, but so far as we know, none of them has as yet been decided. The legal issues are two: First, whether the merger constitutes a purchase or a sale, or both, for purposes of Section 16(b), or, alternatively, whether the purchase of securities in a takeover bid may be matched against the sale of securities of a different company following a merger, for purposes of Section 16(b).

As you know, under the existing provisions of Section 16(b), actions thereunder may be brought only by the company whose securities are involved, or a stockholder of that company suing derivatively on its behalf, and the proceeds recovered go to the company. In most of the takeover bid situations, the dollar amount of potential recovery is quite large and there is thus adequate incentive for the corporation or a stockholder to bring an action. Since relationships between the unsuccessful takeover bidder and the management of the company whose securities were the subject of the bid are usually somewhat unfriendly, there is, if anything, a greater likelihood that the company itself will bring such an action than is generally true in the case of trading by "insiders" in the stock of their own companies.

