

# NEWS

**SECURITIES AND  
EXCHANGE COMMISSION**  
Washington, D. C. 20549  
(202) 272-2650



FOR RELEASE: 10:00 a.m. Monday, February 28

83-8

## SEC Announces Formation of Advisory Committee on Tender Offers

SEC Chairman John Shad announced today formation of the Commission's Advisory Committee on Tender Offers. The Committee includes prominent members of the business and financial community, the legal and accounting professions and academia, who have been actively involved in major tender offers as bidders, targets, arbitrageurs, institutional investors, investment and commercial bankers, attorneys and accountants, or academicians, who have analyzed such practices.

The Committee has been requested to review tender offer practices and regulations in terms of the best interest of all shareholders (i.e., shareholders of all corporations, whether potential bidders, target companies or bystanders) and propose specific regulatory and legislative improvements for the benefit of all shareholders.

Areas for review suggested by the Commission and 12 members of the Senate Banking Committee include such controversial subjects as two-tier offers; "Golden Parachutes" (management compensation upon a change in control); defensive tactics by target companies; including "PAC Man" defenses (tendering for shares of the bidder),

the sale or exchange of a company's "crown jewels", "scorched earth" policies, and so-called "shark repellants" (charter and bylaw amendments to discourage takeover attempts); as well as the Williams Act proration, withdrawal and minimum offering periods; short and hedge tendering practices; and the cost effectiveness of present regulations.

Important questions also include whether

- the threat of tender offers focuses management's efforts on short-term profits, rather than on long-term goals, to the detriment of shareholders;
- tender offers discipline management and facilitate the transfer of corporate assets, in the best interest of shareholders;
- bidders should be required to obtain prior approval from their shareholders of major tender offers and the attendant financings;
- companies should be proscribed from repurchasing large blocks of their stock from potential bidders at premium prices, or required to make similar offers to all their shareholders;

-- and whether it is in the best interest of shareholders that bidders' activities are principally subject to federal regulations, whereas targets' responses are principally subject to state regulations.

Additional areas include the British takeover regulations; the impact upon shareholders in general of bank credit used to finance tender offers; and whether changes should be made in the accounting treatment of acquisitions by tender offers.

The first meeting of the Committee will be held from 10:00 a.m. to 4:00 p.m. on Friday, March 18th at the SEC. It will be open to the public.

Attachment

SEC ADVISORY COMMITTEE ON TENDER OFFERS

Michael D. Dingman, Chairman  
Wheelabrator-Frye Inc.

Robert E. Rubin, General Partner  
Goldman, Sachs & Co.

Professor Frank H. Easterbrook  
University of Chicago Law School

Irwin Schneiderman, Esq.  
Cahill, Gordon & Reindel

Joseph H. Flom, Esq.  
Skadden, Arps, Slate,  
Meagher & Flom

John W. Spurdle, Jr., Senior  
Vice President  
Morgan Guaranty Trust Company

Robert F. Greenhill, Managing Director  
Morgan Stanley & Co., Inc.

Jeff Tarr, Managing Partner  
Junction Partners

Ray J. Groves, Chairman  
Ernst & Whinney

Bruce Wasserstein, Managing  
Director  
First Boston Corporation

Alan R. Gruber, Chairman  
Orion Capital Corporation

Edward L. Hennessy, Jr., Chairman  
Allied Corporation

Professor Greg Jarrell  
Center for the Study of  
the Economy and the State  
University of Chicago

Robert P. Jensen, Consultant  
(former President  
G.K. Technologies, Inc.)

Dean LeBaron, President  
Batterymarch Financial Management

Martin Lipton, Esq.  
Wachtell, Lipton, Rosen & Katz

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-19528]

**Advisory Committee on Tender Offers**

**Establishment and Meeting**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Notice of establishment of the Securities and Exchange Commission  
Advisory Committee on Tender Offers.

**SUMMARY:** The Chairman of the Commission, with the concurrence of the other members of the Commission, has established the Securities and Exchange Commission Advisory Committee on Tender Offers, which is to conduct an examination of tender offers and other related regulations and practices and to recommend to the Commission any legislative and/or regulatory changes the Committee may consider to be in the best interest of all shareholders (i.e., shareholders of all corporations, whether potential bidders, target companies or by-standers).

**DATE:** February 25, 1983

**FOR FURTHER INFORMATION CONTACT:** Linda C. Quinn, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549  
(202) 272-2579.

**SUPPLEMENTARY INFORMATION:** In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. I, and the regulations thereunder, the Commission has ordered publication of this notice that Chairman John S.R. Shad, with the concurrence of the other members of the Commission, has established an advisory committee, under the Federal

Advisory Committee Act, which is designated the Securities and Exchange Commission Advisory Committee on Tender Offers. Chairman Shad certifies that he has considered carefully the establishment of this Committee and, with the concurrence of the other members of the Commission, has found the creation of this Committee to be in the public interest in that it will assist the Commission in the performance of its responsibilities under the federal securities laws.

The Advisory Committee is authorized to examine tender offer and other regulations and practices. Issues that may be considered by the Advisory Committee include: (1) the economic implications of tender offers and other acquisition techniques on the economy in general and specifically with respect to bidders, subject companies, investors and the securities markets; (2) the need for, and the nature and objectives of, regulation of such activities; (3) the regulatory means to accomplish these objectives, weighing the costs against the benefits of such a regulatory response; and (4) possible recommendations to the Commission with respect to legislative and/or regulatory amendments to the current laws to effect such regulatory response.

The Advisory Committee shall conduct its operations in accordance with the provisions of the Federal Advisory Committee Act.

The duties of the Committee shall be solely advisory and shall extend to submitting reports and recommendations to the Commission.

The Securities and Exchange Commission shall provide any necessary support services required by the Advisory Committee.

The Advisory Committee shall meet at such intervals as are necessary to carry out its functions. It is estimated that the meetings of the full committee generally will occur no more frequently than at four week intervals.

The Advisory Committee shall terminate at the end of ten months from the date of its establishment unless, prior to such time, its charter is renewed in accordance with the Federal Advisory Committee Act, or unless the Chairman, with the concurrence of the other members of the Commission, determines that continuance of the Advisory Committee no longer is in the public interest.

A copy of the Charter of the Committee has been filed with the Chairman of the Commission, the Senate Committee on Banking, Housing, and Urban Affairs, and the House of Representatives Committee on Energy and Commerce. A copy of the Charter also has been furnished to the Library of Congress and placed in the Commission's Public Reference Room for public inspection.

By the Commission.

George A. Fitzsimmons  
Secretary

February 24, 1983

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION

CHARTER OF THE SECURITIES AND EXCHANGE COMMISSION  
ADVISORY COMMITTEE ON TENDER OFFERS

Preamble

In accordance with the terms and provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App. I, 86 Stat. 770 (1972), 90 Stat. 1247 (1976), Chairman John S.R. Shad with the concurrence of the other members of the Securities and Exchange Commission ("Commission") hereby establishes an Advisory Committee which will conduct an extensive examination of the tender offer process and other techniques for acquiring control of public issuers. The Commission will seek to determine the economic implications of such transactions on the economy in general and on bidders, subject companies, investors and the securities markets, and to define the need for, and nature of regulation of such activities, to assess the current regulatory scheme in light of the objectives of such regulations, and to recommend to the Commission legislative and/or regulatory changes the Committee may consider necessary or appropriate to accomplish such objectives.

Charter

Pursuant to Section 9(c)(A)-9(c)(J) of the Federal Advisory Committee Act, and by direction of the Chairman of the Commission, with the concurrence of the other members of the Commission:

(A) The Advisory Committee's official designation is the Advisory Committee on Tender Offers.

(B) The Advisory Committee's objectives are to:

1. Identify the economic implications of the tender offer process and other techniques for acquiring control of public issuers in general and specifically with respect to bidders, subject companies, investors in the bidder and subject company and the securities markets;
2. Determine the need for regulation of such activities, and articulate the nature and the objectives of such regulation;

3. Define the regulatory means to accomplish those objectives, weighing the costs against the benefits of such a regulatory response; and
4. As necessary, formulate recommendations to the Commission with respect to legislative and/or regulatory amendments to the current laws to effect such regulatory response.

(C) The Advisory Committee shall operate on a continuing basis until the Chairman of the Commission, with the concurrence of the other members of the Commission, determines that its continuance is no longer necessary in the public interest, subject to paragraph (I) of this Charter, set forth below, and Section 14(a)(2) of the Federal Advisory Committee Act.

(D) The Advisory Committee shall submit its reports and recommendations to the Commission.

(E) The Commission shall provide any necessary support services.

(F) The duties of the Advisory Committee shall be solely advisory and shall extend only to the submission of reports and recommendations to the Commission. Determinations of action to be taken and policy to be expressed with respect to the recommendations of the Advisory Committee shall be made solely by the Commission.

(G) The estimated annual operating costs in dollars and staff-years of the Advisory Committee are as follows:

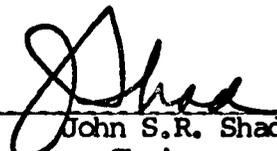
Dollar Cost --- \$30,000 for travel, per diem and miscellaneous expenses for Advisory Committee members and Commission personnel per year on a continuing basis.

Staff-Years --- 1 staff-year, per year, for Commission personnel on a continuing basis.

(H) The Advisory Committee shall meet at such intervals as are necessary to carry out its functions. It is estimated the meetings of the full Advisory Committee generally will not occur more frequently than monthly.

(I) The Advisory Committee shall terminate at the end of 10 months from the date of its establishment unless, prior to such time, its Charter is renewed in accordance with the Federal Advisory Committee Act, or unless the Chairman, with the concurrence of the other members of the Commission, determines that continuance of the Committee no longer is in the public interest. Upon such a determination, the Chairman, with the concurrence of the other members of the Commission, shall direct by amendment to this Charter that the Advisory Committee terminate at such earlier date.

(J) This Charter has been filed with the Chairman of the Commission, the House Committee on Energy and Commerce, the Senate Committee on Banking, Housing and Urban Affairs, and furnished to the Library of Congress on February 25, 1983.

  
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John S.R. Shad  
Chairman

## SEC ADVISORY COMMITTEE ON TENDER OFFERS

### Very Preliminary Outline of Issues\*

**Objectives:** To review tender offer practices and regulations in terms of the best interests of all shareholders (i.e., shareholders of all corporations, whether potential bidders, target companies or bystanders); and to propose specific regulatory and legislative improvements for the benefit of all shareholders.

#### I. Tender Offer Scheme

- A. The present regulatory scheme is intended to be neutral (neither promote nor discourage tender offers), subject to providing adequate time and disclosure to target company shareholders.
1. Is the present regulatory scheme neutral?
  2. Is neutrality in the best interests of all shareholders?
  3. Do tender offers discipline management and facilitate the transfer of corporate assets, in the best interests of all shareholders?
  4. Does the threat of tender offers focus management's efforts on short term profits, rather than on long term goals, to the detriment of all shareholders?
  5. Are tender offers the result of undervaluation of target shares in the market?
  6. To what extent are tender offers a by-product of corporate investment programs?
- B. Would a requirement of prior bidder shareholder approval of major tender offers and the attendant financings be in the best interests of all shareholders?

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\* Advisory Committee members are requested to comment or edit this outline as they deem appropriate and return a copy by March 4, 1983 to Linda Quinn, Associate Director, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street., N.W., Washington, D.C. 20549.

- C. What have been the economic effects of the current regulation on the interests of all shareholders?
  - 1. Can a conclusion be reached as to the amount of litigation brought and its relation to the interests of all shareholders?
  - 2. What is the effect of the regulatory scheme on the cost of shares acquired?
  - 3. What is the impact of present regulations on the number and size of tender offers?
  - 4. What are the effects of current regulations on the cost incurred by: (i) bidders; (ii) target companies; (iii) investors; and (iv) arbitrageurs?
  - 5. What are the offsetting benefits to the foregoing?
  
- D. Under current laws, there are separate regulations, with varying objectives, affecting tender offers (e.g., tax, banking, antitrust, ERISA, federal securities laws, state and federal laws applicable to regulated industries, state securities and corporate laws).
  - 1. What is the proper relationship between the federal securities laws and other regulatory systems?
  - 2. Can and should there be a coordinated substantive or procedural regulatory response?
  - 3. What changes would be in the best interests of all shareholders?

## II. Nature of the Regulatory Response

- A. Definition of the activity to be regulated (should the regulatory response be limited to contested tender offers or should it be an integrated response to a broader class of activities, e.g., acquisitions of control, proxy contests?).
  
- B. With respect to securities and corporate law issues, who should be protected by government regulation, and what should be the purpose of the regulatory response?
  - 1. Disclosure: Under the Williams Act and the rules and regulations thereunder, the purposes of the regulatory response are to assure that target company shareholders have the time and disclosures to make informed investment decisions.

- a. Are these purposes achieved by the current regulatory system?
  - b. Are they in the best interests of all shareholders?
  - c. Should time and disclosure to target company shareholders continue to be the primary objectives of the regulatory response?
  - d. If time and disclosure to target company shareholders are to be the primary objectives, is there a need for changes in the current laws and regulations?
    - (1) Do the benefits of the time and disclosure required, justify the cost of such regulations?
    - (2) Are the information dissemination and timing requirements (e.g., proration, withdrawal and minimum offering period) in the best interests of all shareholders; do they achieve their regulatory purposes; can the purposes of such regulation be achieved by less burdensome, simpler requirements?
    - (3) Should the bidder and target company be required to pre-file tender offer materials prior to delivery to shareholders?
    - (4) Do bidders and target companies have sufficient direct access to shareholders to communicate in an efficient, timely manner which benefits all shareholders?
2. Target Shareholder Equality: Under the current regulatory system, equality has a limited role (e.g., prorationing, best price).
- a. Should equality of treatment of public shareholders vis-a-vis professionals (e.g., risk arbitrageurs) be a more or less dominant objective of regulation?
  - b. Should there continue to be "best price protection" in all tender offers, including Dutch auctions?
  - c. Examples of regulatory equality:
    - (1) British type regulation - purchase of 30% of a target company's outstanding shares within twelve months generally requires an offer to all the shareholders at the same price.

- (2) If an issuer repurchases a specified percentage of its outstanding securities, should it be required to make the same offer to all its shareholders? Would and should this address situations in which a potential bidder accumulates a block of stock and sells it to the target at a premium over the current market price?

### 3. Substantive Fairness of Acquisitions

Under current law, an unaffiliated tender offer does not generally have to provide investors with "fair" consideration.

- a. Should the price paid for shares acquired in a tender offer have to be "fair"? By whose determination?
- b. Should there be price or other proscriptions on two tier offers?
- c. Should state law rights of appraisal be incorporated in federal law? And applied to partial tender offers?

### 4. Auction Market

- a. Should the regulatory response have as an objective assuring an opportunity for an "auction" of the target?
- b. Would this be in the best interests of all shareholders, shareholders of bidders, or shareholders of targets?

### 5. Market Activities

- a. Is there a need to regulate:
  - (1) Risk arbitrage;
  - (2) Short tendering, hedge tendering, etc.; (what are the benefits and disadvantages of such practices to non-professional investors);
  - (3) Options (e.g., are existing remedial procedures established by clearing corporations adequate to address "short squeezes" caused in part by uncovered call writing during complex tender offers?);

(4) Tender guarantees as a mechanism to prevent overtendering.

- b. Should the Commission facilitate use of depository book entry systems and/or encourage clearing corporations to maintain continuous netting programs during tender offers and to adopt uniform close-out and liability notice programs?

6. Target Company Responses

Under the current system, while there are general corporate duties limiting target company managements' responses to tender offers, as a practical matter, there appears to have been little restriction on their defensive strategies.

Should managements' opposition to tender offers, and use of corporate funds be regulated? For example, should there be substantive regulation or required shareholder approval of:

- a. "PAC man" defenses;
- b. Sales of "crown jewels";
- c. Target tender offers for their own shares;
- d. "Scorched earth" policies;
- e. Use of employee benefit plans to acquire shares;
- f. "Golden parachutes" and "silver wheelchairs" (i.e., employment and severance provisions which take effect upon a change in control);
- g. Lock-ups with "white knights" (e.g., sales of blocks or options on sufficient shares to frustrate bidders);
- h. "Shark repellent" (charter and by law amendments to discourage take-over attempts);
- i. Other defensive tactics.

III. Interrelationship Between State and Federal Regulation

- A. Can and should there be state regulation of third party acquisitions of securities from shareholders (e.g., the new Ohio statute)?

B. At present, bidders' activities are principally subject to federal regulation, and targets' responses are principally subject to state regulation. Is this appropriate? If not, what should be done about it?

**IV. Financing**

What is the impact upon shareholders of the credit used to finance tender offers? Should the extension of credit for tender offers be regulated for the benefit of all shareholders?

**V. Accounting**

What changes in the accounting treatment of acquisitions by tender offers or other means would be in the best interests of all shareholders?

**VI. Additional Issues**

See the additional issues raised by 12 members of the Senate Banking Committee in the attached letter.

**Attachment**