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UNITED STATES SECURITIES AND EXCHANGE COMMISSION
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450 Fifth Street, N. W.
Washington, D. C. 20549

OFFICE OF ASSOCIATE DIRECTOR
DIVISION OF CORPORATION FINANCE

Re: SEC Advisory Committee on Tender Offers

Dear Ms. Quinn:

In response to Chairman Shad's letter of February 18, I feel that the Preliminary Outline submitted to the Committee was comprehensive and that the issues are complex. Given that complexity and my desire to exchange views with other Committee members, I will not at this time respond to those issues, except to say that I do feel that regulation should be minimized other than to further fairness to all concerned. Thus, I would not impede tenderors, other than to protect stockholders and to provide a target company with adequate time to react; and I would not interfere with the appropriate prerogatives of the Board of Directors of a defending company in a hostile tender. This is not to say, however, that I will not have strong views on more specific matters as we proceed.

As for particular areas of interest, mine would include:

- a) the consequences of restricting tender offers and related mergers and acquisition activity;
- b) the regulation of short tendering;
- c) guarantees of tenders;
- d) target company responses to tender offers; and
- e) the role of risk arbitrage.

Comments and queries on the Preliminary Outline are indicated on the attached copy.

Very truly yours,



Robert E. Rubin

SEC ADVISORY COMMITTEE ON TENDER OFFERS

Very Preliminary Outline of Issues*

Prefer statement of objectives in the Charter; even though the phrase "economic implications of the tender offer process" is somewhat unclear

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.

Doesn't "neutrality" refer to not favouring bidder vs target rather than "promoting" offers

and certain substantial protections - pro rate, withdrawal rights, "best price"

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?

Does this include expansion and diversification as well as port of 10 investment?

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?

* 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.

Should also whether it would be feasible. Consideration should be given to impact on seeking "white knights" and time constraints involved.

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~~ ^(costs) 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?

What does this mean?

is "economic effect on interests" something different than "economic effect on" or are effects other than in addition to economic effects meant to be included?

imposed on

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?

federal?

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.

only contested third party offers. or is what is meant "conventional" tender offers?

- 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?

and substantive

(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?

is this meant to mean "obtain clearance" or "have reviewed" prior to offering? (materials are in fact "pre-filed" now in a sense)

(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.

Is "direct access" the only issue - combination of time, and access, both direct (mailing) and indirect (publicity), isn't it?

Are institutional investors public shareholders or professionals? where to draw the line and by whom?

- (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 (impact on Icahn type strategy).

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 ~~prescriptions~~ ^{restrictions -? (proscription means ban)} on two tier offers?
- c. Should state law rights of appraisal be incorporated in federal law? And applied to partial tender offers?

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?);

Perhaps should outline prior questions:
What justifications for, or "harm" by, two tier offers?
Why are they used? What could be limitations on them other than outright prohibition.

(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:

therefor, (?)

- 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